LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1950

No. 50

CARL JACOB KUNZ, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED APRIL 21, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 50

CARL JACOB KUNZ, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Notice of appeal to Appellate Part of the Court of Special Sessions	3	2
Complaint	5	3
Endorsements on complaint	6	3
Statement of evidence	9	5
Caption and appearances	9	5
Testimony of Patrolman Francis T. Sullivan	10	5
James Vincent	13	8
Bern Messnick	16	10
Motion to dismiss complaint	18	13
Testimony of Carl J. Kunz	22	15
Renewal of motion to dismiss complaint	38	28
Verdict and sentence	42	30
Defendant's exhibits:		
"A"—Application for Public Worship Permit	48	34
"B"—Copy of Public Worship Permit	50	36
"C"—Official notification disapproving application	52	37
Magistrate's return on appeal	53	37
Notice of appeal to the Court of Appeals	57	39
Certificate of Court of Appeals allowing appeal	59	40

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 29, 1950.

—8469

		Original	Print
Record on appeal to Court of Appeals of New York Continued			
Order of affirmance of Appellate Part of Court of Special Sessions		60	41
Affidavit of no other opinion		61	41
Clerk's certificate	(omitted in printing)	63	
Opinion of Court of Appeals, Desmond, J.		63-1	42
Dissenting opinion, Conway, J.		63-8	49
Dissenting opinion, Bromley, J.		63-21	62
Remittitur of Court of Appeals		64	64
Petition for appeal and assignments of error		67	66
Order allowing appeal		70	68
Citation	(omitted in printing)	71	
Bond on appeal	(omitted in printing)	117	
Praecipe for transcript of record		120	69
Clerk's certificate	(omitted in printing)	121	
Statement of points to be relied upon and designation of parts of record to be printed		123	70
Order noting probable jurisdiction		128	71

[fol. 1] **IN COURT OF APPEALS OF NEW YORK**

THE PEOPLE OF THE STATE OF NEW YORK on the Complaint of FRANCIS T. SULLIVAN, Respondent,

against

CARL JACOB KUNZ, Defendant-Appellant

STATEMENT UNDER RULE 234

This is an appeal from a judgment of affirmance made and entered the 14th day of March, 1949, by the Court of Special Sessions of the City of New York, Appellate Part, First Department, of a judgment of conviction of a violation of Chapter 18, Section 435-7.0 of the Administrative Code of the City of New York, rendered against the defendant on the 14th day of October, 1948, by Hon. Simon Silver, City Magistrate. The sentence was a fine of $10.00 or, in default of payment thereof, three days in the City Prison. The fine was paid.

[fol. 2] This appeal was taken after leave granted by order of Hon. Stanley H. Fuld, an Associate Judge of the Court of Appeals, on the 29th day of March, 1949.

The proceeding was instituted by the service of a summons on the 11th day of September, 1948.

Notice of apeal to this court was served on or about the 6th day of April, 1949, upon Frank S. Hogan, Esq., District Attorney, New York County; John P. McGrath, Corporation Counsel, City of New York; and the Clerk of the Appellate Part, Court of Special Sessions, New York County.

The People of the State of New York are represented by John P. McGrath, Corporation Counsel of the City of New York. The defendant appeared by Mercedes Hoffmann.

No change of parties or attorneys has occurred since the commencement of the proceeding.

[fol. 3] In City Magistrates' Court of the City of New York, Mid-Manhattan District, Borough of Manhattan

The People of the State of New York on the Complaint of Francis T. Sullivan, Respondent,

v.

Carl Jacob Kunz, Defendant-Appellant

Notice of Appeal to Appellate Part of the Court of Special Sessions

To The Chief Clerk of the Magistrates' Court The Corporation Counsel of the City of New York, The Clerk of the Appellate Part of the Court of Special Sessions.

Sirs:

Please take notice that the defendant herein appeals to the Appellate Part of the Court of Special Sessions, held in and for the First Judicial Department from the judgment convicting him of violation of Section 435-7.0 of the Administrative Code of the City of New York, and sentencing him to pay a fine of $10.00, rendered in the Mid-Manhattan City Magistrates' Court by Hon. Simon Silver, on the 14th day of October, 1948.

[fol. 4] The grounds for taking this appeal are as follows:

Section 435-7.0 of the Administrative Code of the City of New York is invalid on its face as an abridgment of freedom of religion and speech guaranteed by the First and Fourteenth Amendments of the Federal Constitution, and Article I, Sections 3, 6, and 8 of the Constitution of the State of New York.

The application of Section 435-7.0 of the Administrative Code of the City of New York to the defendant is unconstitutional in that it abridges his freedom of religion and speech under the Federal and State Constitutions.

Dated, New York, October 20, 1948.

Mercedes Hoffmann, Attorney for Defendant-Appellant, % American Civil Liberties Union, 170 Fifth Avenue, New York City.

[fol. 5] In City Magistrates' Court of the City of New York, Mid-Manhattan Court, Borough of Manhattan

Complaint

City of New York,
County of New York, ss:

Francis T. Sullivan a Patrolman of the Police Department of the City of New York, being duly sworn, says, that on Sept. 11, 1948 at about 10:45 P. M. in the County of New York, City of New York, the defendant Carl Jacob Kunz did unlawfully conduct a religious meeting without a permit in violation of Chapter 435, Section 7.0, of the Administrative Code of the City of New York.

Francis T. Sullivan, HGA, City Magistrate.

[fol. 6] City Magistrates' Court of the City of New York, Mid-Manhattan Court, Borough of Manhattan

Docket No. 12454

The People of the State of New York on the Complaint of Officer

v.

Jacob Karl Kunz

Endorsements on Complaint

Def't arraigned Sept. 14, 1948.

Hon. —— ——, City Magistrate.

Francis T. Sullivan Officer and Shield No. 4588, Assignment 11th—18 pct.

The defendant on being brought before me was informed of the within charge of Violation of Administrative Code of his right to communicate with relatives or friends by letter or telephone, free of charge, of his right to the aid of counsel at every stage of the proceedings and before

any further proceedings and of his right to an adjourn-
[fol. 7] ment to procure counsel.

——— ———, City Magistrate.

Defendant pleads—not guilty.
Tried and found (Guilty).
Dated Oct. 14 48.

Adj. to Sept. 22 48, req. Police. HGA, City Magistrate.
Consent.
Adj. to Oct. 14, 1948. Doris I. Byrne.
Adj. to ——— —, 19—.

——— ———, City Magistrate.

Sentence

Fined $10 or in default of payment imprisonment not to exceed 3 days in City Prison. Committed to City Prison or Workhouse for ——— days.

S. Silver, City Magistrate.

[fol. 8] Fine Paid.

I hereby certify that the within is a true Copy of the record on file at Mid-Manhattan District Magistrates' Court.

New York, Oct. 19, 1948.

Thos. Scimba, Clerk.

Fine Paid.

Date Oct. 14, 1948.
Amount $10.00.
Collected by TS.
Fines Book Entry by TS.
Docket Book Entry by MM.

[fol. 9] In New York City Magistrates' Court, Mid-Manhattan Summons, Borough of Manhattan

The People of the State of New York on the Complaint of Francis T. Sullivan

vs.

Jacob Carl Kunz, Defendant

Statement of Evidence

October 14, 1948.

Before Hon. Simon Silver, City Magistrate

Appearances

Gabriel Mosner, Esq., Police Legal Bureau.

For the defendant: Mercedes Hoffmann, Esq., 170 Fifth Avenue, New York City.

Sanford Aronow, CSR, Official Court Stenographer.

Court Attendant: Jacob Carl Kunz, on the complaint of Patrolman Sullivan. Represented by counsel Mercedes Hoffmann.

The Court: Both sides ready?

Mr. Mosner: People are ready, Your Honor.

Mrs. Hoffmann: Mercedes Hoffmann, 170 Fifth Avenue.

[fol. 10] Pat. Francis T. Sullivan, Shield No. 4568, attached to the 18th Precinct, called as a witness for the People, after being duly sworn, testified as follows:

Direct examination.

By Mr. Mosner:

Q. Did you serve a summons on this defendant, officer?

A. I did.

Q. Please state the facts to the Court leading up to the service of that summons.

A. At about 10:45 on September 11th——

Q. A. M. or P. M.?

A. P. M., on the northwest corner of Columbus Circle, the defendant was conducting a religious meeting.

By the Court:

Q. Strike that out. That's a conclusion. Tell us what he was doing.

A. He was standing on a box and talking.

Q. To anybody?

A. He had a group of people around him, approximately twenty.

Q. There was a group of people around twenty people standing in front of him?

A. Yes, sir.

Q. He was addressing them, is that it?

A. Yes, sir.

Q. All right.

A. Accompanied by a fellow officer, I went up and asked him for his permit to conduct this meeting. He did not have any. I asked him to step down and properly identify himself. He did. Then I served him with a summons for violation of the Administrative Code.

By Mr. Mosner:

Q. What had you heard him say before you went up to speak to him?

A. At one point he got into a discussion with an old [fol. 11] woman—an elderly woman—and she said she had formerly been a Catholic, and the defendant said, well, he was glad that she was no longer paying for salvation.

By the Court:

Q. He said he was glad—what?

A. That she was no longer paying for salvation.

Q. Paying for salvation.

A. That's right. In another part of the speech he said that the Catholic church has maintained that they uphold the 10th Commandment, but that in the last 25 years they have not upheld the 1st Commandment.

He then quoted a passage from the Bible which he was carrying quoting St. Paul about—I don't know exactly how the passage went. It was something about "false idols before you".

By Mr. Mosner:

Q. Anything else, officer, that you remember?

A. He made a statement that he had been accused of anti-Semitism and he quoted part—from the Bible again—I believe it was showing that St. Paul held the same views that he had expressed for which he had been accused of anti-Semitism.

Q. Anything else?

A. He made a statement that people do not need churches for salvation. All they need is Jesus Christ. He said Catholics pay money to priests to get people out of purgatory, and there is no such thing as purgatory. He made other statements, I don't remember his making.

Q. Other statements similar to that that were made——

A. Yes.

The Court: Well——

[fol. 12] Mr. Mosner: I withdraw the question, and strike the answer.

Mrs. Hoffmann: We will concede that the defendant was addressing this assemblage on a topic of religion.

The Court: Well, I think he is attempting to go beyond that, Miss Hoffmann.

Mrs. Hoffmann: Off the record.

The Court: All right.

(Discussion off the record.)

By Mr. Mosner:

Q. Then you served a summons upon the defendant?

A. That's right.

Q. And did you have a conversation with him when you served the summons on him?

A. No. He showed me his driver's license.

Q. And that was all?

A. And gave me a business card with his name and address, and that was all there was to it.

Q. Did you ask him his occupation?

A. Yes. He said he was a preacher of the word of God.

Mr. Mosner: That's all.

Mrs. Hoffmann: That's all.

Mr. Mosner: Step down.

The Court: No cross.

Mr. Mosner: Mr. Vincent.

[fol. 13] Mr. James Vincent, called as a witness for the People, after being duly sworn, testified as follows:

Direct examination.

By Mr. Mosner:

Q. Give your name, please.
A. James Vincent.
Q. Address, please.
A. 34 West 60th.
Q. Your occupation, please.
A. Motion picture director, retired.
Q. Mr. Vincent, do you recall September 11th of this year some time around the hour of 10 P. M.?
A. Quite well, sir.
Q. Do you remember where you were at that time?
A. I was at Columbus Circle, between 58th and 59th Street.
Q. Did you see the defendant there at that time?
A. Yes, sir.
Q. And did you see the officer some time later?
A. Yes, sir.
Q. Do you remember what time you got to this location?
A. Around 9 o'clock, approximately.
Q. Was the defendant there when you got there?
A. Yes, sir.
Q. Did you hear the defendant speak?
A. Yes, sir.
Q. Did he speak from a platform, or was he alongside of you?
A. He spoke both on the ground and then afterwards on a platform.
Q. Do you remember what he said?
A. Yes.

By the Court:

Q. Among other things, do you remember some of the things he said?
A. Yes. He had been talking for months, and I have stenographic——
Q. No, strike that out.
A. —reports——
[fol. 14] Q. Strike that out; on that day in question.

A. On that day; on that night I listened to what the officer said, and I can confirm all that he said.

Q. Is there anything specific that you remember?

A. I didn't take any special notes on that particular day. I have the notes of things leading up to it.

Q. Is there anything from which you can refresh your recollection as to what he said that night?

A. Yes.

Q. All right. You say refresh your recollection and tell us what he said that night.

A. "The Catholic Church makes merchandise out of souls." One important thing that he did say, definitely, was that the Catholic Church has various Bibles in which they differ, one especially about the word "repentance" and "penance".

I called his attention to the fact that the Bible he had is a translation, that the Bible of the Catholic Church is the Latin "vulgate", in Latin. That's the only authentic Bible, and mere translations of words were not enough to condemn the Church.

Q. Did he say anything with respect to that question or statement of yours?

A. Yes. There was a little discussion with another Catholic as to the point, and he says, "There is a couple of Catholics arguing among themselves."

By Mr. Mosner:

Q. Is that all?

A. There are a few others, if you want them.

Q. What?

A. There was general talk in opposition to the Catholic Church at that time, a transcription of which I have here. He talked in general, but these are quotations previously, [fol. 15] but those that he spoke at that particular night may have varied from the actual quotations.

By the Court:

Q. In words?

A. In words. I could give you the sense, if you went that.

By Mr. Mosner:

Q. What were they to the best of your recollection?
A. Well, there were things like: "Catholics fight to go to purgatory."

By the Court:

Q. Catholics—what?
A. Catholics fight to go to purgatory."
"Catholics worship graven images."
"Catholics worship Mary, blespheming by Calling her the mother of God."
"The Pope is the anti-Christ."
"666 is written in Revelation."
"The Catholic Church is a religion of the devil."
"The Catholic religion lies."
"They can save for a price."
"Priests tear up the words of God. They offer you a place of torment."
"The Catholic Church is a doctrine of the devil."
"We are not here to prove the doctrine of the Catholic Church."

The Court: I think that's enough.
Mr. Vincent: "If you follow the Church——"
Mr. Mosner: All right. That's all.
Mrs. Hoffman: No questions.
Mr. Mosner: Mr. Messnick.

[fol. 16] Mr. Bern Messnick, called as a witness for the People, after being duly sworn, testified as follows:

Direct examination

By Mr. Mosner:

Q. Your name, please?
A. Bern Messnick.
Q. Address, please?
A. Engineers Club, New York City.
Q. What is your occupation, Mr. Messnick?
A. Construction engineer.
Q. Sit back in your chair; speak up loudly.
A. Construction engineer.

Q. On September 11th at about the hour of 10 P. M., do you remember where you were?

A. Yes, I was on Columbus Circle.

Q. Did you see the defendant?

A. Yes.

Q. Was it at that place?

A. Yes.

Q. Did you hear him speak?

A. Yes.

Q. Was he speaking from the platform?

A. I heard him speak both on the ground before he got up on the platform, and I heard him on the platform.

Q. Now, do you recall what he said?

A. Yes. Among other things he said, he was discussing in detail some of the financial practices of the Catholic Church when he was on the platform and also he spoke about the Hebrew religion. Among other things that were said that night was that he believed that "All the garbage" —this is an exact quotation—"that didn't believe in Christ should have been burnt in the incinerators. Its a shame they all weren't."

On the ground they objected. When some of the people in the audience objected to statements that a speaker prior to Mr. Kunz on the platform made, the word "Christ"——

[fol. 17] By the Court:

Q. Was that to him?

A. No. He came in with the word—he was on the ground —the word "Christ-killer" was used to these people.

By Mr. Mosner:

Q. What about the defendant; did he say that?

A. Yes.

By the Court:

Q. Well, let me get that again. Some other speaker was speaking and some people in the audience did what?

A. Objected to what he said. Mr. Kunz, standing in front on one side of the platform facing the speaker to the left about two feet back, came up with the remark, "Ch-ist-killers."

Q. Mr. Kunz did?

A. That's right, at that time.

The Court: I see.

Mr. Mosner: That's all.

Mrs. Hoffman: Just a moment, please.

Cross-examination

By Mrs. Hoffmann:

Q. Are you certain it was Mr. Kunz who made all of these remarks?

A. Yes. Yes, Miss Hoffmann, I am.

Q. How many other speakers were there that night?

A. I heard two more.

Q. You heard two more where?

A. Speakers.

Q. Where?

A. At that same platform. No, one more, I beg your pardon, one more speaker that night on that platform.

Q. That particular platform?

A. Yes.

Q. Is that the only platform you were near?

[fol. 18] A. No. The reason I can be very definite about those remarks were that—let me phrase that properly—a complaint had been filed about this particular speaking group, and I was listening carefully to make sure I would know exactly what was said.

Q. You were listening to this particular group?

A. That's right.

Q. You are very certain that Mr. Kunz spoke about the Jews and not another speaker?

A. Very certain. Another speaker had spoken about them, but Mr. Kunz in addition had also spoken about them.

Q. How long was Mr. Kunz talking?

A. I heard him about 12 minutes.

Q. Did you hear the other witnesses testify here?

A. Yes, I did.

Q. Did you hear the police officer testify?

A. Yes, I did.

Q. You heard Mr. Vincent, I believe his name is?

A. That's right; about that 12 minutes. It might be 10 or it might be 15. Let's make it about 12.

Q. And did you hear all of the remarks which these gentlemen said Mr. Kunz had made?

A. I heard some of them. I could not say that I remember hearing all of them.

Mrs. Hoffmann: All right.

Mr. Mosner: That's the People's case. Step down.

MOTION TO DISMISS COMPLAINT

Mrs. Hoffmann: Your Honor, I will at this time move to dismiss the complaint because the ordinance upon which it is based is invalid on its face as an abridgment of freedom of religion and speech guaranteed by the 1st and 14th [fol. 19] Amendments of the Federal Constitution and article 1, Sections 3, 6, and 8 of the Constitution of the State of New York.

I will at this point call Your Honor's attention briefly to the section. The section is unconstitutional in that it prohibits completely the use of the streets to any person who does not fall into the categories named therein.

It is further unconstitutional in that it gives to the police authorities the power to exercise a previous restraint upon a person who falls within the categories named therein. It also enables the police officers to act as censors of the person and the activity involved.

The section is not so drawn so that the Police Commissioner is confined to considering the use of the streets for traffic and the convenience of pedestrians.

The statute is further unconstitutional in that it uses language, to wit, it prohibits "to ridicule or denounce any form of religious belief, service, or reverence."

It is our contention that this language is so broad and subject to so many interpretations that in and of itself, the entire section if for no other reason would be unconstitutional. I ask therefore that the complaint be disinissed.

Mr. Mosner: Well, the People rest their position squarely upon the two cases in the Court of Appeals, of People ex rel. Doyle vs. Atwell, and People vs. Smith, in which latter [fol. 20] case the very Code of Ordinances from which this particular section of the Administrative Code was drawn was passed upon, that is, from a constitutional point of view.

The Court of Appeals at that time said that if the legislature sees fit to denote classes of persons who will or who won't get a permit, that legislative intendment will not be upset by the courts, and the case of People vs. Smith held that particular section of the Code of Ordinances constitutional. And our position is based squarely upon the

ruling of the Court of Appeals in the case of People vs. Smith previously quoted, 263 New York.

The Court: I think another thing, and that is, article 1 which you rely on to give him the opportunity or to prevent any one from impairing his right to exercise free religion, doesn't that article also serve for him to consider as well as the authorities? I mean, wouldn't his act be a violation of article 1? Wouldn't he be interfering; I mean on its face, wouldn't he be interfering with some one else's free exercise of religion?

Mrs. Hoffmann: Your Honor, that's an interesting question which I don't think you really want me to answer now. What I do want to point out is this. I want Your Honor to notice that the charge here is that he preached without a permit.

This matter has arisen before, both as a departmental with the police, and in this court. That is always the charge. [fol. 21] Our point is that you cannot on the theory that a man will commit a crime or an offense, bar him from the streets in the first place, assuming that it is lawful to have this provision altogether. But the Police Department's attitude seems to be that, "Since we are convinced that this man will in our opinion ridicule or denounce religion, we will not permit him to speak at any time, any place, throughout the entire City of New York." In our opinion that alone on its——

The Court: Of course, the statute is not quite that broad, as you say. The statute is rather clear. It says, "It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assemblage of persons for public worship or exhortation or to ridicule or denounce."

Mrs. Hoffmann: Yes.

The Court: No, I think the statute is constitutional. Your motion is accordingly denied; exception to the defendant.

Counsel moves to dismiss on the ground that the People have failed to establish a prima facie case. That motion is denied; exception to the defendant.

[fol. 22] Mr. Carl J. Kunz, the defendant, testifying in his own behalf, after being duly sworn, testified as follows:

The Court: Give your name and address, please.

Mr. Kunz: Carl J. Kunz, 2 South Portland Avenue, Brooklyn 17, New York.

Direct examination.

By Mrs. Hoffmann:

Q. Mr. Kunz, what is your business or profession?

A. Preacher.

Q. Will you describe how you practice your preaching? Will you speak loudly so that it will be heard.

A. Yes. I go out on highways and byways and preach the word of God.

Q. It is your religious conviction that this is the way you are to practice your religion?

A. Yes. I feel this way, that the Holy Bible is the word of God. And whether the Holy Bible, the word of God, ridicules or denounces any man's religion, I am going to preach it. I feel I have a perfect right.

Now on this Saturday night when I was up there preaching from 10 to 11 o'clock, I was only up on my box about 2 or 3 minutes when the officer came over and arrested me. Now I may have said a lot of these things a little different from what they brought them out, but that night the officer knows right well that they were ready to give me a summons, because all summer long I had been preaching without a permit.

I went right to the sergeant and right to the officer, and they very plainly told me—I told them I had no permit, I told them I had my case in the Court of Appeals, and they didn't object.

[fol. 23] So one night they told me that they wasn't going to let me preach no more without a permit, and there was at least four Roman Catholic groups up there preaching without a permit, and I said if they had a right to preach without a permit I felt that I had a right to preach without a permit.

And so one of the sergeants says to me in July——

Mr. Mosner: I object to anything that the sergeant said, Your Honor,——

The Court: Sustained.

Mr. Mosner: —unless the sergeant is present.

The Court: Sustained. You may not tell what the sergeant said to you in July.

Mr. Kunz: I may not? All right.

By the Court:

Q. Tell us what happened that night, or if there are any statements that were made that you wish to refute, you may do so.

A. Well, I refute as time previous to that. Now, this man said regarding "Christ-killer". I have here a Bible issued by the Roman Catholic Church, and I tell the people, I think the Roman Catholic Church is wrong when they teach their people that the Jews are the synagogue of Satan. There it is right in the Roman Catholic Bible. You read it. Here is the statement right here. I feel they're wrong in doing that.

By Mrs. Hoffmann:

Q. What Bible is that?

A. That's the Roman Catholic Bible. They says that the [fol. 24] Jews are the synagogue of Satan, and I believe they shouldn't say such a thing. Now the Roman Catholic Church also——

The Court: Just a moment.

Mrs. Hoffmann: Just a moment. I don't want to offer a Bible in evidence.

Mr. Kunz: Well, it's in there.

The Court: You may continue.

Mr. Kunz: Now, I feel that the Roman Catholic Church, they have out a circular called "Freedom of Worship—the Catholic position", and since this circular has been out there has been much fighting amongst the Christians and the Roman Catholics just through this circular. May I read some of this, what it says?

Q. Mr. Kunz, do you read from this circular at your meetings? Do you read from this particular circular?

A. No, I—yes, I have read it. I told them that they're wrong.

Q. Will you read the portion from this circular which you read at this meeting?

A. I'll read the portion. Now, the Roman Catholic Church says:

> "As far as God's law is concerned, no one has a real right to accept any religion save the Catholic religion, or to be a member of any church save the Catholic Church, or to practice any form of divine worship save that commanded or sanctioned by the Catholic Church. At first sight, this claim may seem arrogant. It certainly presents a striking contrast to the statement we hear so frequently today that every one has a perfect [fol. 25] inalien right to practice any form of religion he wishes, but a little thought will show that the Catholic position is perfectly reasonable. Any person who believes in a personal God to whom all creatures are subject must admit that he is entitled to command all men to accept and to practice one particular form of religion. Now Catholics hold"—just a little more.

Q. All right.

A. "Now Catholics hold that God has actually done this, that he has imposed on all men the obligation to accept and to practice Catholicism, the religion founded by the divine Redeemer of the world. Logically, then, Catholics hold that no one has a genuine right as far as God's Law is concerned, to profess any religion except the Catholic religion."

Mrs. Hoffmann: Off the record, please.

Mr. Kunz: Just two more sentences I'd like to bring out. Now it says:

> "The Catholic attitude toward non-Catholic religious beliefs is known technically as doctrinal intolerance. The Catholic, convinced as he is that the Catholic religion is the only true religion, is intolerant toward other creeds. No reasonable person can't object to such an attitude for if the Catholic religion is true all others must be false."

Q. Now, Mr. Kunz, you were reading that section from a pamphlet entitled "Freedom of Worship—the Catholic position".

A. Yes.

Q. Published by the Paulist Press.

A. Yes. I didn't believe it, and I went right over and bought that for ten cents.

[fol. 26] Q. The author is Francis J. Connell. Now at this meeting you read——

By the Court:

Q. Of course, there is nothing there to indicate that the Catholic Church is the publisher of this, or anything like that.

A. The imprimatur is on there. They have a right to publish it. I have no objection to their publishing it.

Mr. Mosner: May I suggest there be some connection with that particular pamphlet——

Mrs. Hoffmann: Now I'll refer back to the stenographer later if I feel it necessary that he copy some more of this. I'd like to finish with Mr. Kunz. I am just wondering, I frankly can't decide whether I want all of this about the imprimatur.

The Court: All right. If you decide you want it——

Mrs. Hoffmann: All right.

By Mrs. Hoffmann:

Q. You were reading from this publication and discussing why it your opinion this was incorrect, is that right?

A. That's right.

Q. On this particular evening.

A. Yes.

Q. Now, Mr. Kunz——

A. No, I won't say on this particular evening, because this evening I had nothing to say there at all. I was only up there a few minutes and he took me down off the box. This was from times previous to that.

Q. But generally speaking, you read from the Bible and you read from official Catholic Bibles and official Catholic publications?

A. That's right.

[fol. 27] Q. And you attempt to refute what is said therein?

A. Yes.

Q. Now, Mr. Kunz, did you make an application this year for a public worship permit?

A. I did.

Mr. Mosner: I'll concede he made an application in 1948 and it was disapproved.

Mrs. Hoffmann: Will you give me a form copy?

Mr. Mosner: Well, you subpoenaed blank copies of the application and a blank copy, a sample copy I should say of a public worship permit, and I have them here, and I'll concede that in 1948 Mr. Kunz made an application to the Fourth Deputy Police Commissioner for a permit and on July 13th of this year that application was disapproved.

Mrs. Hoffmann: And will you also, Mr. Mosner, agree to have this blank form filled out as the original was, and accept it as a true copy of the original application made for 1948?

Mr. Mosner: Yes, I will.

The Court: You will conform it?

Mr. Mosner: I'll conform it.

Mrs. Hoffmann: And since I happen to have here the official notification which Mr. Kunz received disapproving his permit, I'd like to offer that in evidence.

The Court: Received.

Mrs. Hoffmann: May I suggest it be marked as follows, Defendant's Exhibit A, the application for a public worship permit.

[fol. 28] (Received and marked in evidence as Defendant's Exhibit A.)

Mr. Mosner: And then Defendant's Exhibit B is a sample copy of a public worship permit.

(Received and marked in evidence as Defendant's Exhibit B.)

Mr. Mosner: And that Defendant's Exhibit C is the notification to Mr. Kunz on July 13th, that is, the official notification that his application was disapproved.

The Court: Is that satisfactory, Miss Hoffmann?

Mrs. Hoffmann: Yes.

(Received and marked in evidence as Defendant's Exhibit C.)

By Mrs. Hoffmann:

Q. Had you made application for a public worship permit in 1947?

A. I did.

Q. And was that application refused?
A. That's right.
Q. Marked "rejected".

Mr. Mosher: "Disapproved".

Q. But you had no public worship permit for 1947?
A. No.
Q. Did you have a public worship permit in 1946?
A. Yes, I did.
Q. What happened to that permit?
A. That permit was taken away from me while I was preaching down in Hanover Square.
Q. It was revoked?

The Court: It was revoked?

A. Revoked, yes.
[fol. 29] Q. Prior to the revocation of the permit, did you have hearings before the Fourth Deputy Police Commissioner?
A. That's right, before the Fourth Deputy Police Commissioner O'Leary.

By the Court:

Q. Before the Deputy Commissioner, or was that before the so-called Unity Board?
A. No, before the Police Commissioner.

Mr. Mosner: Fourth Deputy Police Commissioner.

By Mrs. Hoffmann:

Q. And is this a true copy of the letter you received revoking your permit?
A. Yes.

The Court: What happened to the original?

Mrs. Hoffmann: It's filed in a previous matter. We have decided to read this letter into evidence. It's dated November 7, 1946: "Mr. Carl J. Kunz."

Mr. Mosner: So that Your Honor will know about it, I think it would be more expeditious if we read it slowly to you, so that you won't have to later offer it. It's addressed to Mr. Carl J. Kunz, 2 South Portland Avenue, Brooklyn 17, New York:

"Dear Sir: Please take notice that numerous complaints have been received by this department concerning the manner in which you have been conducting public worship meetings under public worship permit No. 11 issued to you by this department.

As a result of the complaints, the undersigned, in his [fol. 30] discretion, has held hearings at which many persons appeared and gave testimony to substantiate complaints that you have ridiculed and denounced religion while conducting such meetings.

The complaints, in my opinion, have been fully substantiated. My determination in the matter is that you have, contrary to the provisions of law under which the permit was issued, ridiculed and denounced religion, and I am, therefore, in the exercise of discretion, as provided by law, revoking your permit effective forthwith. Very truly yours, Cornelius O'Leary, Fourth Deputy Commissioner." Continue.

Mrs. Hoffmann: May we read into the record the rules and regulations of the Police Department?

Mr. Mosner: Well, they're self-explanatory.

Mrs. Hoffmann: You will concede what I am about to read is a true copy of the regulations applying to public worship permits—what is it called?

Mr. Mosner: Manual of Procedure.

Mrs. Hoffmann: Police Manual of Procedure, public worship permits:

Public worship permits are issued in compliance with chapter 23, article 3, paragraph 20 of the Code of Ordinances.

2. Application will be filed by the applicant at the Division of Licenses with two photographs, one and a half inches square, and (not machine type) of recent date. [fol. 31] Permits expire on December 31st of the year of issuance. No fee is charged for this permit.

3. The holder of a public worship permit will be required to notify the precinct commander concerned of the time and location of any street meeting he or she intends to hold. The commanding officer of such precinct will approve of the location, provided he does not interfere with traffic or other local conditions. All meetings must be conducted

in an orderly manner and only under the auspices of the organization or person mentioned in the permit. 'No collections will be taken or contributions accepted, nor will any literature or merchandise be sold in connection with a meeting.''

The Court: Is that all of it?
Mrs. Hoffmann: I think that that's all.
The Court: Is that all you want to read in?
Mrs. Hoffmann: Yes.

By Mrs. Hoffmann:

Q. Just to tie it up, at no time since 1946 have you been given a permit by the Police Department, even though you asked for it?
A. No, they didn't give me any.
Mrs. Hoffmann: That's all.

Cross-examination.

By Mr. Mosner:

Q. Mr. Kunz, before that 1946 permit was revoked, you had a hearing, is that right?
A. That's right.
[fol. 32] Q. And was that November 7, 1946?
A. About that time.
Q. And you had attended the hearing before the Fourth Deputy Police Commissioner?
A. That's right.
Q. Those were on two days, is that right?
A. That's right.
Q. One was on October 11th and the other one was on November 1st?
A. That's right.
Q. Is that right?
A. Around that time, yes.
Q. Now, do you know what it was that led to the hearings?
A. Yes.
Q. What was it that led to the hearings?
A. Well, I have another piece of literature here put out by the Roman Catholic Church, with the imprimatur of the Catholic Church, which says——

Mr. Mosner: Just a minute. I move to strike that from the record as not responsive.

The Court: No, it isn't responsive.

By the Court:

Q. Mr. Kunz, what Mr. Mosner asked you was, do you know what incident or development led to a hearing being held before the Fourth Deputy Police Commissioner?

A. That's right.

Mr. Mosner: Without——

Mr. Kunz: I am coming to it right now.

Q. Well, no, that isn't what led to it. The thing published by the Catholic Church which you have in your hand wasn't what led to your hearing,——

A. I'll put it this way.

Q. —or led to your having a hearing. What caused it, [fol. 33] if you know?

A. Well, the Holy Bible which I read, preach, and teach from is contrary to the teaching of the Roman Catholic Church; thereby I am ridiculing and denouncing the Roman Catholic Church. And here is one illustration right here from this pamphlet.

By Mr. Mosner:

Q. And as a result of doing that you say you were called before the Fourth Deputy Police Commissioner, is that right?

A. That's right.

By the Court:

Q. In other words, you say because you read from that pamphlet you were called before the Deputy Police Commissioner?

A. No. These points I brought out were contrary to their teaching.

Q. All right.

A. Now——

By Mr. Mosner:

Q. Just one minute. Before that time had you had any discussion with persons other than persons of the Roman Catholic faith?

A. Yes. I preach the word of God regardless of which——

Mr. Mosner: I move to strike the answer as not responsive.

The Court: Strike it out.

Q. Will you please answer my question, Mr. Kunz. Did you ever have a discussion with people other than those of the Roman Catholic faith?

A. I did.

Q. That was before the time that this permit was revoked?

A. I did.

[fol. 34] Q. And of what faith were they?

A. What faith? There was the Watchtower people, Christian Science people, and the seventh day Adventist people.

Q. People of the Jewish religion?

A. Well, I haven't done much ministering to the Jews, but I have spoken to Jews.

Q. I ask you specifically with reference to the time before the time that you were called before the Fourth Deputy Police Commissioner. Do you recall ever having a discussion with a person of the Jewish faith before that meeting?

A. I have spoken to people of the Jewish faith before my license was revoked.

Q. And would you say that it was only the people of the Roman Catholic faith whom you had discussions with that led to your being called before the Fourth Deputy Police Commissioner, or was it the discussion with all of those people?

A. Well, I——

The Court: In other words——

A. My 18 complaining witness were all Roman Catholics.

The Court: Go ahead. I thought I might elucidate on the question. If you can answer it, go right ahead.

Q. You say all of the 18 complaining witnesses——

A. Were Roman Catholics.

Q. Did you see Mr. Messnick here this morning? Mr. Messnick, will you please stand up. (Mr. Messnick stands up.) Did you see Mr. Messnick here this morning?

A. Yes, I did.

[fol. 35] Q. Did you ever see him before this morning?

A. I see him up at Columbus Circle.

Q. How many times have you seen him?

A. Oh, I became acquainted with Mr. Messnick when he happened to sock one of my Christian boys in the puss. That's when I became acquainted with him; a little boy, a Christian.

Q. Do you know whether he is of the Roman Catholic faith?

A. No.

Q. Do you know whether he is Jewish?

A. I heard he was Jewish, but I have the same gospel for the Jew as I have for the gentile.

Q. Now, what takes place at your meetings, Mr. Kunz? By that I mean, do you talk or do other people talk or do you have the meeting alone?

A. Just now?

Q. No. Your regular meetings; the meeting that you had on September 11th and those other meetings around 1946.

A. All my meetings, I used to have meetings two hours daily.

Q. Now, do you speak or do other people speak?

A. Other people speak. I used to get three, maybe four speakers.

Q. And generally there are other people who listen, is that right?

A. That's right.

Q. Now, about how long do your meetings take?

A. Two hours daily, Monday through Friday, Lord willing, weather permitting.

Q. Do you ever have any trouble at your meetings?

A. When an officer is there, no trouble at all.

Q. I asked a question.

The Court: He is answering. When an officer is there; there is no trouble.

[fol. 36] By the Court:

Q. When an officer is not there, do you have trouble?

A. I have trouble then.

By Mr. Mossner:

Q. You do?

A. The same as at Columbus Circle; with an officer, no trouble.

Q. Were you recently a complaining witness against a woman in this very court who was charged with disorderly conduct at one of your meetings?

Mrs. Hoffmann: I think I'll have to object. I think the record is swelling magnificently, and not exactly related.

The Court: That wouldn't be the grounds of an objection, Miss Hoffmann.

Mrs. Hoffmann: I am aware of that, your Honor, but after all it has nothing to do with the fact that Mr. Kunz was preaching without a permit.

The Court: Well, I think Mr. Mosner's questioning is not objectionable. He wants to show, if he can, that troubles arise, unless you want to concede it.

Mrs. Hoffmann: Well, I would like to remind Mr. Mosner that the last time he and I were here on a similar matter, he conceded as far as Mr. Kunz was concerned that there were no trouble, as you put it, your Honor, there was no interference with traffic, there was no disorderly conduct.

The Court: Oh, well, interference with traffic is not what he is asking him. He is asking him about troubles [fol. 37] with the audience.

Mr. Mosner: That's right, your Honor.

Mrs. Hoffmann: Well, I concede that the audience and Mr. Kunz engage in spirited debate on the things that Mr. Kunz says.

The Court: Is that enough for you?

Mr. Mosner: Well, I don't think it is, your Honor. I think it is more than spirited when Mr. Kunz himself is the complaining witness against a woman.

The Court: All right. I'll allow the question.

By the Court:

Q. Did you appear as a complaining witness against a woman listener at one of your meetings?

A. That's right. I'll tell you how it come about.

The Court: No, no; that's not necessary.

By Mr. Mosner:

Q. And did that incident take place as a result of your conducting one of your meetings? Yes or no?

A. Repeat that?

Q. The incident that I am speaking about, did that incident take place as a result of your conducting one of your meetings?

A. Yes, it was one of my meetings.

Mr. Mosner: I have no other questions, Judge.

Mrs. Hoffman: That's all.

[fol. 38] By the Court:

Q. Mr. Kunz, let me ask you one or two questions. Are you an ordained minister or preacher?

A. Ordained.

Q. Ordained by what——

A. East End Baptist Church.

Q. What schooling did you have?

A. What schooling? Just the Word.

Q. Did you go to——

A. No.

Q. Did you go to a theological seminary of any sort?

A. No, I did not.

Q. Did you go to any college?

A. No.

Q. What schooling have you had?

A. What schooling? The Bible School.

Q. What formal schooling have you had?

A. I graduated from a grammar school and that is all.

By Mrs. Hoffmann:

Q. How long have you been preaching, Mr. Kunz?

A. About six years.

Q. When did you receive the calling?

A. Six years.

Mr. Mosner: All right; step down. Any other witnesses? Defendant's case?

RENEWAL OF MOTION TO DISMISS COMPLAINT

Mrs. Hoffman: Defendant's case. At this point, your Honor, I would like to renew my motion to dismiss on the ground the evidence has shown that the interpretation of the statute by the Police Commissioner in practice is such that he deems it proper for him to make inquiry concerning all aspects of the proposed speaker except where he wants to speak and what time he wants to speak; that it [fol. 39] is clear that if the Police Commissioner for reasons which are wholly unrelated to traffic deems a cause or a person undesirable, that no permit is issued.

The question of traffic comes up only after the permit has been issued. Then the local police commander is directed to allow the speaker to speak where he wants to, provided it does not interfere with traffic. This occurs after the permit is issued. I want particularly to call that to your Honor's attention.

Mr. Mosner: Well, in view of Miss Hoffmann's latest remarks with relation to time and place, I take it, that is, I assume that Miss Hoffman is thinking along the Saia case lines; namely, the case where an ordinance in the City of Lockport, New York, was declared unconstitutional for indefiniteness. I'd like to say that specifically in the Saia case, the Supreme Court said that they were not considering the question of constitutionality of that particular statute with reference to the Davis case, which is the very case upon which the Court of Appeals relied in passing upon the constitutionality of this very section in People vs. Smith.

Now, the Davis case is an old, hallowed case. It's a case that arose in the City of Boston and it relates to a statute which is exactly like the one we have here for consideration. It inhibited in no way any one's right to freedom of speech or freedom of worship. It did inhibit the individual person's rights to the use of public streets, streets which had been dedicated to the use of the public. And interestingly enough, in some of the most startling literal decisions that have come down from the Supreme Court in recent years, [fol. 40] namely, the Hague vs. the C. I. O. case, specifically the Supreme Court of the United States did say that that Davis case was not being considered that particular day and that the Davis case was still the law.

And specifically again in the most recent case involving civil liberties, the Saia case, again the Supreme Court did

say that they were not taking the Davis case to task, that the Davis case was still the law.

And the People urge that the defendant be found guilty as charged and be sentenced accordingly.

The Court: Miss Hoffmann, this excerpt that you have given me, or this decision rather by the Court of Appeals in the Nahman case, is there any relationship that you wish to——

Mrs. Hoffmann: Yes, I wanted your Honor to know that in that case the Court pointed out that never had a permit been refused, that a defendant was offered an alternative location, that there was no instance of complete barring of the streets altogether to the defendant at all times. And it seems to me there is a very definite implication there to the effect that in this case the man is flatly denied the use of the streets under all circumstances.

The Court: Your contention is that in this Nahman case, that there the basis for the constitutionality was that under no circumstances was one refused a permit to parade some place, and that that was true with respect to the marching with a placard or walking around with a placard?

Mrs. Hoffmann: In that case, as I remember it, your Honor, the defendants had never made an application for a [fol. 41] permit. They were attacking the section on general constitutional grounds, which I am not waiving by offering your Honor this decision. This happens to be the most recent word from our Court of Appeals on this subject, and it seems to me that our case even if this is not enlarged as now in the Supreme Court, but even if this remains the law of New York State as most recently expressed, that our case would clearly be one in which the circumstances which the Court has declared must exist, in fact do not.

The Court: I have the feeling, Miss Hoffmann, that especially in a large city like this City of New York, bearing in mind that religion is a very tender emotion amongst most human beings, that this statute is not only constitutional but desirable, extremely desirable, that for the protection of the people who are going to do the speaking themselves it is necessary in a big city like ours where people become so emotional and might very well inflict serious bodily harm.

Mrs. Hoffman: Your Honor will allow me to interrupt, if I am so doing. I want it perfectly clear why I am here. The organization to which I belong, the American Civil

Liberties Union, feels that the risks which ordinary citizens take by speaking their piece and the annoyance which possibly they cause their neighbors by speaking their piece is worth taking, that efforts to restrain before a man speaks are no good, that they inflict serious injury upon us, that they deprive us of the right to exercise our freedoms.

One day Mr. Kunz is deprived, another day somebody else is deprived. In order to avoid this happening to anybody, this type of section should not be permitted to exist.

We do not maintain that a man can at any time go any [fol. 42] place he feels like and say whatever he wants, no. But we do say that the way to restrain him is not by having a section which enables a police official in the best of faith to say, "I think it is better that this man should not talk in New York City." This we feel is wrong.

The Court: Of course, the arrests are made after the speaking is done, however.

Mrs. Hoffmann: But the basis is not what he said.

The Court: All right; your motion is denied. Your motion on behalf of the defendant to dismiss at the close of the entire case on the ground that the defendant hasn't been proven guilty beyond a reasonable doubt is likewise denied.

Are there any other motions that you wish to make at this time?

Mrs. Hoffmann: No. I deem that whatever exceptions I should have taken and might not have been taken will be taken.

Mr. Mosner: I'd like to be heard on sentence, your Honor.

Verdict and Sentence

The Court: The defendant is found guilty as charged. Mr. Mosner, I will hear you on the question of sentence.

Mr. Mosner: If your Honor please, with all due respect I'd like to tell the Court I have spoken to Mr. Kunz time and time before the trial of this case, and it is difficult for me to become involved in this subject subjectively, because I have never overheard Mr. Kunz' remarks until this afternoon when he took the stand.

Frankly, I took no offense at what he said, and I wasn't intent upon getting into any particular difficulty with him. However, I think your Honor should be apprized of the fact [fol. 43] that it is not only Mr. Kunz now, but there is a con-

dition up at Columbus Circle that the police are finding it increasingly difficult to cope with.

I know Mr. Kunz and I know Mrs. Hoffmann. I know that Mr. Kunz is going to continue. He is going to continue to speak up there. He is not going to change. He has cooperated beautifully up to this point.

Three weeks ago when we made application for this adjournment, I asked him to cooperate with me and not to please speak until the conclusion of this case, and he has, I understand, cooperated. However, there are many people up at Columbus Circle who hear Mr. Kunz speak. You have seen only two of them, your Honor. The Police Department is flooded with complaints about Mr. Kunz, and I think that I'd like to apprize your Honor of these facts before you sentence him.

The Court: Miss Hoffmann.

Mrs. Hoffmann: May I mention this, that insofar as Mr. Kunz is concerned, he has been without a permit now for three years, two and some odd years. This seems to me a little bit strange, but to him it is a matter of very vital concern. He has cooperated to a much larger extent than Mr. Mosner says.

Last year for practically the entire year he did not speak. This year he was told he might speak without a permit. He was told that it would be all right. Then a policeman came and said, "Why don't you get a permit?", and he said, "They won't give it to me," and he said, "Sure they will. Why don't you go down?"

He went down and did not get a permit. I don't think he should be punished for that. He made every effort.

[fol. 44] The Court: At the time of the last trial and at the time of sentence, I was guided very strongly by the fact that since the time that Mr. Kunz had been, or at least since the time that his license had been revoked and the time of the arrest, he had refrained from speaking, and that he only spoke after telling the officer at the time in Hanover Square that he was going to speak and that he wanted to be arrested because they wanted a test case to be made. Accordingly, I made it a very nominal fine.

Now, if that were the situation which obtained today, I would follow in the same vein, but if he has been speaking not merely to have an arrest for the purpose of testing out the law but just because he decided that he was going to

exercise what he thought were his rights, then of course it is a different problem. It is a different question.

Mrs. Hoffmann: The problem is substantially the same. It was necessary for this performance to come about again in order for this particular statute to get up to the Court of Appeals.

The Court: Mr. Mosner, is Miss Hoffmann's statement correct, that he had refrained from speaking all of last year, that this year somebody told him it was all right to speak, and that thereupon he commenced speaking until they could arrange to have an arrest made?

Mr. Mosner: This morning I was told by Miss Hoffmann he had not spoken, and I thanked him. Mr. Vincent, will you come up here? Now, Mr. Vincent tells me he was there last night.

Mrs. Hoffmann: Handing out leaflets.

Mr. Vincent: I was there every night.

The Court: Did he speak last night?

Mr. Vincent: He didn't speak because the officers wouldn't [fol. 45] let him. He got up at one time and they took him down. Some of the others got up——

The Court: You see, the point is this, Mr. Kunz. It may very well be ultimately determined that you have been done a great injustice. I don't know. I don't think so, but the Supreme Court of the United States might declare this section unconstitutional. But until that time, you must abide by the law as it is written, and no one can relieve you of complying with that law, and if you take my advice you wouldn't defy it until it is declared unconstitutional.

Mr. Mosner: I am satisfied if he stays away from Columbus Circle, your Honor.

The Court: All right. In view of our understanding now, I'll make it $10.

Mrs. Hoffmann: May I ask your Honor to set a lower fine?

The Court: I thought that was a nominal fine.

Mr. Mosner: Judge, may I be heard on this particular point? I accidentally happened to be here the day that Mr. Kunz happened to be the complaining witness against a woman for disorderly conduct. This is the only time now that I begin to feel personal about this.

That woman was five months pregnant. He was the complaining witness against her for being disorderly, and so vituperative so far as he was concerned——

Mr. Kunz: Your Honor, can I say a word?

The Court: No, I won't take that into consideration.

Mr. Kunz: May I say a word on that?

The Court: I will not take that into consideration. I think I am setting a nominal fine, and I am only doing it [fol. 46] because I have your assurance that you are going to keep away from Columbus Circle. I understand that you will give that assurance. Is that so?

Mr. Kunz: Keep away from Columbus Circle?

The Court: That you will not speak at Columbus Circle.

Mr. Kunz: Well, can't I go up to Columbus Circle?

The Court: You may go to Columbus Circle. It's still a free country from that standpoint, but not to speak there.

Mr. Kunz: Not to speak.

The Court: Not to speak up at Columbus Circle; not to continue to speak there because you have no permit, don't you see. Didn't you understand what I said up to now?

Mr. Kunz: Can I show placards up there?

The Court: We are not going to discuss that at all.

Mr. Kunz: And hand out religious leaflets?

Mr. Mosner: That's a sore spot up there, Judge. There are 200, 250 people every night.

The Court: What about the placards?

Mr. Mosner: We can't keep Mr. Kunz from going up there. We want him to refrain from——

The Court: From speaking.

Mr. Mosner: Yes, Judge. There are informal discussions besides those from the platform. The police should have some right to do something. We don't have to wait until a riot starts before we do something.

The Court: I maintain that that's what this section is there for, to avoid just that. If I didn't think so, I wouldn't have found the way I have here.

[fol. 47] Now I think, Mr. Kunz, that it is too bad that you have to start all over again, but that's not our fault. You have to start all over again now in order to get up to the proper court, but pending that time we don't want to take any chance with there being any difficulty.

Mr. Mosner: I suggest that the placards may sometimes be just as insulting to some of these people as the spoken word.

Mr. Kunz: Well, it is from the Holy Bible.

Mr. Mosner: Here we go again.

Mrs. Hoffman: May we have this off the record?
The Court: Yes, off the record.

(Discussion off the record.)

(Defendant sentenced to $10 or 3 days.)

The above is a correct transcript of the minutes taken in this case.

Sanford Aronow, Official Court Stenographer.

[fol. 48] DEFENDANT'S EXHIBIT "A"

4 D. C. #—

Police Department, City of New York

Division of Licenses

156 Greenwich Street

New York 6, N. Y.

(Photograph)

APPLICATION FOR PUBLIC WORSHIP PERMIT

(Application Must Be Printed or Typewritten)

1. Name *Carl J. Kunz.*
2. Residence Address *2 South Portland Ave., B'klyn 17, N. Y.*
3. Place of Birth *Troy, N. Y.*
4. Date of Birth *Dec. 29, 1899.*
5. Are you a Clergyman? *No.*
6. Are you a Minister? *Yes.*
7. Are you a Lay Preacher? *Yes.*
8. Are you a Lay Reader? *Yes.*
9. Have you been awarded a degree by a College, Seminary or similar Institute? (Give name and degree) *No.*
10. Are you responsible to or regularly associated with any Church or Missionary Society? *Yes.* If so, give name and location, also name of Pastor or responsible officer of Society. *Outdoor Gospel Work, 2 So. Portland Ave., Brooklyn 17, N. Y. Carl J. Kunz, Director.*

[fol. 49] 11. Under whose auspices are services to be conducted? *Outdoor Gospel Work.*

12. State your qualifications for this permit *Publicly ordained to the work of the Gospel Ministry, on the 28th day of September, 1946, by a counsel of pastors at East End Baptist Church, 263 Van Sicklen Ave., B'klyn, N. Y., Rev. Donl. Marsh, Pastor.*

13. Do you intend to make collections, receive or obtain any money from persons at meetings by the sale of books, periodicals or other methods? *No.*

14. Give names and addresses of three (3) persons as references who are familiar with your work, preferably those connected with your Church or Society, who reside in your immediate locality.

Name *Charles F. Grosholz, Add. 1831 Stephen St., Ridgewood, L. I.*

Name *Olsen Wacker, Add. 17 S. Oxford St., B'klyn 17, N. Y.*

Name *Julius Wolfe, Add. 1270 Ocean Ave., B'klyn, N. Y.*

15. Have you ever had a Public Workship Permit? *Yes.* Last No. and yr. *1946.*

16. Has application ever been disapproved? *Yes.* Year *1947.*

17. Has permit ever been revoked? *Yes.* Year *1946.*

18. When filing application for permit, applicant will furnish (2) two photographs, 1½ inches square, of recent [fol. 50] date (Machine Type Photos Will Not Be Accepted). (Self-Addressed, Stamped Envelope Must Accompany Application.)

Signature of Applicant *Rev. Carl J. Kunz.*

Date of Application *July 9th, 1948.*

Note: Permits when issued expire on December 31st of year of issuance. Application for renewal should be made prior to date of expiration.

DEFENDANT'S EXHIBIT B

Police Department, City of New York

Public Worship Permit

Permit No. 643

Issued: —— —, ——.
Expires: —— —, ——.

Permission to Conduct Outdoor Religious Services in the City of New York, Subject to Regulations as Described Below:

Photo.

Is Granted to —— ——. Address: ——, ——.

(Organization under whose auspices meeting is conducted.)

[fol. 51] 1948

REGULATIONS GOVERNING THE USE OF THIS PERMIT

1. The holder of this Permit will be required to notify the Commanding Officer of the Precinct of the time and location of any Street Meeting he or she intends to hold. The Commanding Officer will approve of the location providing it does not interfere with Traffic or other local conditions.

2. All meetings must be conducted in an orderly manner and only under the auspices of Organization mentioned above. Person conducting meeting must prevent any collections or contributions, or the sale of any literature or merchandise.

3. This Permit is issued in accordance with Chapter 18, Section 435-70a of the Administrative Code of the City of New York and is revocable at any time.

(Signed) James J. Sheehy. (Deputy Police Commissioner.)

L.D.153.

(On reverse side:) Police Department, City of New York, Public Worship Permit.

[fol. 52] DEFENDANT'S EXHIBIT "C"

Police Department, City of New York

B.I.4. In effect Sept. 21, 1917(a).

—— Precinct.

Date: July 13, 1948.

Public Worship

Disapproval No. 5

Your application for public worship has been disapproved.

To Carl J. Kunz, 2 South Portland Ave., Brooklyn, N. Y.
James J. Sheehy, Fourth Deputy Commissioner.

[fol. 53] IN CITY MAGISTRATES' COURT OF THE CITY OF NEW YORK

Appeal Bureau—100 Centre Street

To the Appellate Part of the Court of Special Sessions of The City of New York

Charge: Violation of Chapter 435, Section 7.0 of the Administrative Code of the City of New York

THE PEOPLE OF THE STATE OF NEW YORK, On the Complaint of Police Officer FRANCIS T. SULLIVAN

v.

CARL JACOB KUNZ, Defendant-Appellant

MAGISTRATE'S RETURN ON APPEAL

By Simon Silver, City Magistrate.

Attorney for Appellant: Mercedes Hoffman, Esq., % American Civil Liberties Unión, 170 Fifth Avenue, New York City.

Return is herewith made to an appeal taken on the 21st of October, 1948 in the above entitled case.

The defendant was arraigned before the Honorable Harry G. Andrews at the Mid-Manhattan Court, Borough of Man-

hattan, on the 14th of September, 1948 on the affidavit and [fol. 54] complaint of Francis T. Sullivan, a Police Officer of the City of New York, assigned to the 18th Precinct, who did state in his affidavit that on September 11th, 1948, at about 10:45 P. M., in the County of New York, City and State of New York, the defendant, Carl Jacob Kunz, did unlawfully conduct a religious meeting without a permit in violation of Chapter 435, Section 7.0, of the Administrative Code of the City of New York.

The defendant upon his arraignment was informed by the Court of the charge against him and of his rights and privileges under the law. The defendant entered a plea of not guilty and the case was adjourned to September 22nd, 1948.

The case was further adjourned to October 14th, 1948 and on this date the defendant came before me for trial and was represented by Mercedes Hoffmann, Esq.

After hearing the testimony of the complainant, Police Officer Francis T. Sullivan, and witnesses James Vincent and Bern Messnick, each on behalf of the People, and the motion of counsel for the defense to dismiss the complaint because the ordinance upon which it is based is invalid on its face as an abridgement of freedom of religion and speech guaranteed by the 1st and 14th Amendments of the Federal Constitution and Article 1, Sections 3, 6 and 8 of the Constitution of the State of New York, and after hearing the argument of counsel in support of his motion, the Court denied the motion and also denied the motion of counsel for the defense to dismiss on the ground that the People had failed to establish a prima facie case.

The defendant testified in his own behalf and at the conclusion of the entire case, counsel for the defense renewed [fols. 55-56] the motion to dismiss on the ground that the evidence had shown that the interpretation of the statute by the Police Commissioner in practice was such that he deemed it proper for him to make inquiry concerning all aspects of the proposed speaker except where he wanted to speak and what time he wanted to speak; that it was clear that if the Police Commissioner for reasons which were wholly unrelated to traffic deemed a cause or a person undesirable, that no permit was issued. After hearing the argument of counsel in support of her motion, the Court denied the motion. The Court also denied the motion made on behalf of

the defendant to dismiss at the close of the entire case on the ground that the defendant had not been proven guilty beyond a reasonable doubt, and did find the defendant guilty as charged. The Court imposed a fine of $10. or in default of payment, imprisonment not to exceed three days in City Prison.

From all the evidence adduced at the trial of this defendant I was convinced beyond a reasonable doubt that he was guilty of the offense as charged in the complaint.

Copy of the affidavit of complaint together with a copy of the minutes as taken by the official stenographer are herewith attached and made a part of this return, all of which is respectfully submitted.

January 14, 1949.

Simon Silver, City Magistrate.

[fol. 57] In Court of Special Sessions, Appellate Part—New York County

The People of the State of New York on the complaint of Francis T. Sullivan, Respondent,

vs.

Carl Jacob Kunz, Defendant-Appellant

Notice of Appeal to the Court of Appeals

Sir:

Please take notice that the defendant hereby appeals to the Court of Appeals from a certain judgment or order of the Appellate Part of the Court of Special Sessions, New York County, on March 14, 1949, and affirming the judgment of conviction rendered against him in the Mid-Manhattan Magistrates Court on October 14, 1948 by Hon. Simon Silver, City Magistrate, and sentenced on that day to pay a fine of $10.00 or in default of payment, imprisonment not to exceed three days in City Prison, and from each and every part thereof.

Please take further notice that this appeal is taken pursuant to leave granted by Hon. Stanley H. Fuld, a judge of the Court of Appeals, on the 29th day of March, 1949, in which it was certified that there is a question of law

[fol. 58] involved which ought to be reviewed by the Court of Appeals.

Dated, New York, April 6, 1949.

Yours, etc., Mercedes Hoffmann, Attorney for Defendant-Appellant, Office & Post Office Address c/o American Civil Liberties Union, 170 Fifth Avenue, New York, N. Y.

To: Frank S. Hogan, Esq., District Attorney, New York County; John P. McGrath, Corporation Counsel, City of New York; Clerk of the Appellate Part, Court of Special Sessions, New York County.

[fol. 59] In Court of Appeals of New York

The People of the State of New York on the complaint of Francis T. Sullivan, Respondent,

vs.

Carl Jacob Kunz, Appellant

Certificate Allowing Appeal

I, Stanley H. Fuld, an associate judge of the Court of Appeals, do hereby certify that there is a question of law involved in the above entitled case, which ought to be reviewed by the Court of Appeals.

Dated: New York, N. Y., March 29, 1949.

Stanley H. Fuld, Associate Judge of the Court of Appeals.

[fol. 60] At an Appellate Part of the Court of Special Sessions of the City of New York, held in and for the first Judicial Department, in the County of New York on the 14th day of March, 1949.

Present: Hon. George B. DeLuca, Hon. Alfred J. Hofmann, Hon. William B. Northrup, Justices.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent

vs.

CARL JACOB KUNZ, Appellant

ORDER OF AFFIRMANCE

Heretofore, and on the 14th day of October, 1948, the defendant-appellant, Carl Jacob Kunz having been tried and convicted upon the charge of Vio.-Sec. 7.0 of Chap. 435 of the Administrative Code of the City of N. Y. by Hon. Simon Silver, a City Magistrate, at the Mid-Manhattan District City Magistrates' Court, in the Borough of Manhattan, City of New York and sentenced as follows: $10 or 3 days and an appeal by Carl Jacob Kunz from the judgment aforesaid having been taken to this Court on the 21st day of October, 1948, and the said appeal having been argued by Mrs. Mercedes Hoffmann of counsel for [fol. 61] the Appellant, and by Mr. John P. McGrath (Mr. Joseph J. Lucchi) of counsel for the Respondent; and due deliberation having been had thereon, it is

Ordered and adjudged, that the said judgment so appealed from be and the same is hereby in all respects affirmed. (See Peo. v. Smith, 263 N. Y. 255; appeal dismissed 292 U. S. 606) No opinion. All concur.

Enter, (Sgd.) George B. DeLuca, Justice Presiding.

AFFIDAVIT OF NO OTHER OPINION

STATE OF NEW YORK,
County of New York, ss:

Mercedes Hoffmann, being duly sworn, deposes and says that: I am the attorney for the defendant-appellant in this proceeding.

The Magistrate who heard the proceeding originally rendered no opinion either written or oral except as appears from the record.

The Court of Special Sessions of the City of New York, Appellate Part, First Department, rendered the following decision:

"Heretofore, and on the 14th day of October, 1948, the defendant-appellant, Carl Jacob Kunz, having been

tried and convicted upon the charge of Vio. Sec. 7.0 of Chap. 435 of the Administrative Code of the City of N. Y. by Hon. Simon Silver, a City Magistrate, at the [fol. 62] Mid-Manhattan District City Magistrates' Court in the Borough of Manhattan, City of New York and sentenced as follows: $10. or 3 days, and an appeal by Carl Jacob Kunz from the judgment aforesaid having been taken to this Court on the 21st day of October, 1948, the said appeal having been argued by Mrs. Mercedes Hoffmann of counsel for the Appellant, and by Mr. John P. McGrath. (Mr. Joseph J. Lucchi) of counsel for the Respondent; and due deliberation having been had thereon, it is

Ordered and adjudged, that the said judgment so appealed from be and the same is hereby in all respects affirmed. (See Peo. *v.* Smith, 263 N. Y. 255, appeal dismissed 292 U. S. 606) No opinion. All concur.

Enter, (Sgd.) George B. DeLuca, Justice Presiding."

Mercedes Hoffman.

Sworn to before me this 25 day of April, 1949. David Hoffmann, Notary Public, State of New York. Qualified in New York County, N. Y. Co. Clk's No. 360, Reg. No. 972-H-O. Commission Expires March 30, 1950.

[fol. 63] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 63-1] In the Court of Appeals of New York

The People of the State of New York, Respondent

vs.

Carl Jacob Kunz, Appellant

Argued October 5, 1949; Decided December 29, 1949

Constitutional law—municipal ordinances—meetings for religious purposes on city streets—police regulation—validity of requirement for permit—(1) clergymen convicted of violating ordinance forbidding preaching of religion

on streets of New York City without permit; permit granted defendant had been revoked for denunciation of religions contrary to ordinance; conviction affirmed—(2) ordinance requires issuance of permit to clergyman and certain others and regulations give police control only by requiring advance notice of meeting and approval of location subject to traffic conditions; ordinance necessary street regulation; requirement of permit not unconstitutional here—(3) revocation of permit reviewable under article 78 of Civil Practice Act; impropriety of such revocation no defense here—(4) since defendant used permit to utter insults tending to incite disorder, public order and decency required that meetings be stopped.

1. A clergyman has been convicted of violating section 435-7.0 of the New York City Administrative Code which forbids any person to be instrumental in collecting an assemblage of persons for public worship or to ridicule religion or to preach atheism or agnosticism on the streets of the city, but authorizes preaching or expounding by one who has obtained a permit as an authorized representative of a religious, atheistic or agnostic group. When arrested, defendant was conducting a religious meeting but without the required permit. Upon this appeal he contends that the statute is unconstitutional on its face. The conviction should be affirmed.

2. As construed by the police department and as here applied, the ordinance is not unconstitutional either as al- [fol. 63-2] lowing the police commissioner to determine as a censor who may address the public on the streets or as prohibiting ridicule of religion. Reading into the ordinance the governing police regulations, it is clear that, merely upon application therefor, such a permit is granted for one year to any of the persons listed in the ordinance. Police control of meetings is allowed only to the extent of requiring advance notice to a police captain who must approve of the location requested unless traffic conditions make it inexpedient to use that site for such purpose. So read, the law is no more than a necessary and reasonable regulation of the use for public meetings of the crowded streets of a great city.

3. After a hearing on charges, defendant's permit to speak was revoked because "contrary to the provisions

of law under which the permit was issued" he had "ridiculed and denounced religion". Subsequent applications by defendant for permits were denied and at the time of his arrest for speaking without a permit, he was again delivering denunciations against the same religions. Power to revoke such a permit for cause, while not specifically mentioned, is implied, and, in any case, alleged illegality of a revocation is reviewable by proceedings in the nature of certiorari (Civ. Prac. Act, art. 78). Moreover, impropriety of the revocation of a former license in this case was no defense.

4. While the prohibition against ridiculing or denouncing any religion—read by itself—might be thought unconstitutional here, defendant got his permit with no questions asked as to what he would preach and he used the permit to utter insults and epithets tending to incite disorder. A police regulation, printed on the permit, stated that "all meetings must be conducted in an orderly manner". Public order and decency required that defendant be stopped.

Appeal, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Court of Special Sessions of the City of New York, Appellate Part, in the first judicial department, entered March 14, 1949, which [fol. 63-3] affirmed a judgment of a Magistrate's Court of the City of New York, Borough of Manhattan (Silver, M.), convicting defendant of unlawfully conducting a religious meeting without a permit in violation of section 435-7.0 of the Administrative Code of the City of New York.

Osmond K. Fraenkel and *Mercedes Hoffmann* for appellant. I. Section 435-7.0 of the Administrative Code of the City of New York is unconstitutional on its face since it prohibits the use of the streets altogether to all persons who would preach, exhort or expound on religious or anti-religious topics who do not fit into certain specified categories. (*Jamison* v. *Texas*, 318 U. S. 413; *Schneider* v. *State*, 308 U. S. 147.) II. The section sets up no proper standards for the exercise of official discretion. *Lovell* v. *City of Griffin*, 303 U. S. 444; *Saia* v. *New York*, 334 U. S. 558; *Hague* v. *C. I. O.*, 307 U. S. 496.) III. The section requires and enables the police commissioner to determine as a censor who may address the public on the streets. (*Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*,

318 U. S. 418; *Jamison* v. *Texas*, 318 U. S. 413; *Thomas* v. *Collins*, 323 U. S. 516; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496; *Saia* v. *New York*, 334 U. S. 558.) IV. The section infringes upon freedom of speech and religion by the use of broad and vague prohibitions upon the content of a speaker's remarks. (*Cantwell* v. *Connecticut*, 310 U. S. 296; *Thomas* v. *Collins*, 323 U. S. 516; *Terminiello* v. *Chicago*, 337 U. S. 1.) V. The section requires previous registration and identification as a condition to exercising the right to make a public speech. *Thomas* v. *Collins*, 323 U. S. 516.) VI. The unconstitutional features of the section apparent on its face are confirmed and emphasized by the rules and regulations and official practice and procedure of the police department and the police commissioner. (*People* v. *Nahman*, 298 N. Y. 95; *Cox* v. *New Hampshire*, 312 U. S. 569.) VII. The section as applied to defendant is unconstitutional and an abridgment of his freedom of speech and religion. (*Saia* v. *New York*, 334 U. S. 558; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Sellers* v. *Johnson*, 163 F. 2d 877, 332 U. S. 851; *West Virginia* [fol. 63-4] *State Bd. of Educ.* v. *Barnette*, 319 U. S. 624.) VIII. The unconstitutional features of the section are not cured by the possibility of judicial review of administrative acts. IX. *People* v. *Smith* (263 N. Y. 255), relied on by the court below, does not represent the law at the present time and should not be followed in this case.

John P. McGrath, *Corporation Counsel* (*Joseph J. Lucchi* and *Seymour B. Quel* of counsel), for respondent. I. A virtually identical statute was upheld in *People* v. *Smith* (263 N. Y. 255), which has not been overruled. II. Ordinances similar to section 435-7.0 have been found valid by the Court of Appeals and by the United States Supreme Court. (*Cox* v. *New Hampshire*, 312 U. S. 569; *Prince* v. *Massachusetts*, 321 U. S. 158; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *People* v. *Nahman*, 298 N. Y. 95; *People* v. *Hass*, 299 N. Y. 190; *People* v. *Lewis*, 295 N. Y. 42; *Kovacs* v. *Cooper*, 336 U. S. 77.)

Opinion

Desmond, J.:

Defendant, a clergyman, was convicted and fined $10, after a trial before a New York City Magistrate, for violating section 435-7.0 of that City's Administrative Code. The material parts of that statute (which is set out in full at the beginning of Judge Conway's opinion in this case) may be summarized as follows:

1. It shall be unlawful in any New York City street, for anyone to collect a crowd for public worship or exhortation, or to ridicule or denounce any religious belief, or to preach atheism or agnosticism;

2. However, any clergyman or authorized representative of any religious group, or of any atheistic or agnostic society, may preach or expound his cause, in any public place specified in a permit which may be granted him by the police commissioner;

3. Any violation is punishable by a fine of not more than $25, or thirty days' imprisonment, or both.

Appellant insists that this law is unconstitutional on its face, for a number of reasons, principally because, as defendant thinks, it allows the police commissioner, uncontrolled by any proper standards, "to determine as a censor [fol. 63-5] who may address the public on the streets", and because it prohibits any ridicule or denunciation of religion by anyone. We do not think that the statute, as administratively construed by the New York City Police Department and as applied here, is invalid for either of those asserted reasons.

Although this section says in its first paragraph that a street-preaching permit "may be granted and issued" by the police commissioner, to any of the persons listed, this record shows that such a permit is granted to any such person, on mere application therefor. Each such permit is for a calendar year and specifies no time or place for speaking, but, on the face of the permit there is printed a police department regulation requiring the permittee to notify the commander of the police precinct concerned, of the proposed time and place of any street meeting, whereupon "The Commanding Officer will approve of the

location providing it does not interfere with Traffic or other local conditions." Reading those regulations into the ordinance, as we can and should (see *People* v. *Nahman*, 298 N. Y. 95, and *People* v. *Hass*, 299 N. Y. 190, appeal dismissed 338 U. S. 803, rehearing denied 338 U. S. 881), we construe the ordinance as requiring the commissioner to give an annual permit for street preaching, to anyone who, like defendant, is a minister of religion, and as allowing police control of meetings only to the extent of requiring advance notice to a police captain who must approve of the location, unless traffic conditions there make it inexpedient to use that site for such purposes. Thus read, the law is no more than a necessary and reasonable regulation of the use, for public meetings, of the crowded streets of the world's greatest city, "general and non-discriminatory legislation [regulating] the times, the places, and the manner of" holding street meetings (*Cantwell* v. *Connecticut*, 310 U. S. 296, 304; see *Cox* v. *New Hampshire*, 312 U. S. 569). The possible unconstitutionality of this permit procedure, as curtailing the rights of those who are not clergyman, like defendant, is not for defendant to argue or for us to consider in this case (*O'Kane* v. *State of New York*, 283 N. Y. 439, 449). Thus, that part of the statute [fol. 63-6] which deals with permits is clearly not unconstitutional. The other part, forbidding the denunciation or ridicule of religion, will be dealt with herein after we have summarized the additional facts of this case.

In 1946, defendant applied to the commissioner for, and received, a permit for street preaching. The meetings he held during that year brought to the commissioner's desk a flood of complaints from citizens who charged that defendant had, in violent words, denounced two great religions, each of which has very large membership in New York City. The commissioner thereupon, on notice to defendant, scheduled a hearing on such charges, before a deputy commissioner. A two-day hearing followed, at which defendant and eighteen complainants appeared and gave testimony. The complaints were amply proven, and the commissioner wrote defendant that his permit was revoked, because he had "contrary to the provisions of law under which the permit was issued, ridiculed and denounced religion". Later defendant, successively, applied for permits for 1947 and 1948, but in each instance he was

notified of disapproval. On September 11, 1948, without a permit, he held a religious meeting at Columbus Circle, in Manhattan, and again delivered himself of violent diatribes against the same religions he had castigated before. He was arrested and charged with street preaching without a permit. On the trial he admitted that, while there was no trouble at his exhortations when a police officer was present, trouble there was when the police were absent.

While the ordinance does not specifically mention revocation of licenses, for cause, we think such power is fairly implied and, in any case, the alleged illegality of a revocation is reviewable by appropriate civil proceedings in the nature of certiorari (Civ. Prac. Act, art. 78). Since the licensing law was valid, one who preached without a license was guilty of a violation, and any impropriety of the revocation of a former license was no defense. We think, too, that once the 1946 permit was revoked for good reasons, the commissioner was not bound to issue further permits. The commissioner had no reason to assume, and no promise [fol. 63-7] was made, that defendant wanted a new permit for any uses different from the disorderly ones he had been guilty of before. The police regulations, printed on the permit and mentioned above, say that "all meetings must be conducted in an orderly manner"—surely a modest requirement—and defendant had shown that his utterances were of the kind that usually do, and in defendant's case, did, result in disorder, except when the police provided protection. As the Magistrate pointed out at the close of this trial: "in a large city like this City of New York, bearing in mind that religion is a very tender emotion amongst most human beings, that this statute is not only constitutional but desirable, extremely desirable, that for the protection of the people who are going to do the speaking themselves it is necessary in a big city like ours where people become so emotional and might very well inflict serious bodily harm." Actually, what defendant here insists on as his constitutional right is not only a permit irrevocable for any cause, but the regular attendance at his meetings of a cordon of policemen to curb the wrath of those whose deepest feelings he wantonly wounds. He claims a constitutional right to incite riots, and a constitutional right to the services of policemen to quell those riots. It seems to us that if a community can bar from its streets

all raucously noisy advertising devices (*Kovacs* v. *Cooper*, 336 U. S. 77) it may stop defendant from starting religious wars on New York's teeming thoroughfares.

It may be that the first sentence of this ordinance, making it unlawful for anyone "to ridicule or denounce any form of religious belief, service or reverence", if read off by itself, and without relation to the rest of the ordinance, or of these facts, might be thought unconstitutional. But we have no such question here. This man got his permit with no questions asked as to what he would preach. But he used that permit to spew out insults and epithets; public order and decency required that he be stopped (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572), and after due hearing and full proof, he was stopped. As the Supreme Court said in the *Chaplinsky* case (*supra*) no constitutional problem is raised by the prevention and punishment of "in-
[fol. 63-8] sulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (315 U. S. at p. 572). It is the duty of the police to end such disorder.

In arriving at these conclusions we have not relied on *People* v. *Smith* (263 N. Y. 255, appeal dismissed 292 U. S. 606) which held valid and constitutional this very statute, but have considered the question anew, on the facts of this particular case.

The judgment should be affirmed.

Dissenting Opinion

Conway, J. (dissenting):

Defendant has been convicted of unlawfully conducting a religious meeting without a permit in violation of section 435-7.0 of chapter 18 of the Administrative Code of the City of New York. The conviction has been affirmed by the Appellate Part of the Court of Special Sessions and the case is here by permission of a Judge of this court.

Section 435-7.0 reads, in full, as follows:

"a. *Public worship.*—It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assemblage of persons for public worship or exhortation, or to ridicule or denounce any form of religious belief, service or reverence, or to preach or expound atheism or

agnosticism, or under any pretense therefor, in any street. A clergyman or minister of any denomination, however, or any person responsible to or regularly associated with any church or incorporated missionary society, or any lay-preacher, or lay-reader may conduct religious services, or any authorized representative of a duly-incorporated organization devoted to the advancement of the principles of atheism or agnosticism may preach or expound such cause, in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner. This section shall not be construed to prevent any congregation of the Baptist denomination from assembling in a proper place for the purpose of performing the rites of baptism, according to the ceremonies of that church.

"b. *Interference with street services.*—It shall be unlawful for any person to disturb, molest or interrupt any [fol. 63-9] clergyman, minister, missionary, lay-preacher or lay-reader, who shall be conducting religious services by authority of a permit, issued hereunder, or any minister or people who shall be performing the rite of baptism as permitted herein, nor shall any person commit any riot or disorder in any such assembly.

"c. *Violations.*—Any person who shall violate any provision of this section, upon conviction thereof, shall be punished by a fine of not more than twenty-five dollars, or imprisonment for thirty days, or both."

The police commissioner, in compliance with the second sentence of subdivision a (*supra*) has adopted certain implementing administrative procedure. Applications for a permit are made at the division of licenses of the police department. Permits are issued for a year, expiring on December 31st of the year of issuance. No fee is charged for the permit. The questions on the application blank for the permit are designed to elicit information as to whether the applicant is one of the persons specified as eligible for a permit. No inquiry is made in the application blank as to the proposed time and place of the religious meetings to be held by the applicant, but the pertinent regulations of the police department, which are printed on the permit itself, provide in part that the holder of the permit will be required to notify the commanding officer of the precinct of the time and location of any street meeting he or she intends to hold, and

that the commanding officer "will approve" of the location provided it does not interfere with traffic or other local conditions.

Defendant describes himself as a preacher who goes out on the highways and byways and preaches the word of God. He speaks under the auspices of "Outdoor Gospel Work" of which he is the director. He has had no formal training beyond grammar school—"Just the Word"—but was "ordained to the work of the Gospel Ministry" in 1946 by a "counsel of pastors" in Brooklyn and has been preaching for about six years.

In 1946, defendant applied for and received a public worship permit. The police department soon received numerous complaints that he had ridiculed and denounced cer- [fol. 63-10] tain religious beliefs while conducting his meetings. Hearings at which eighteen complainants appeared and testified were held by a deputy police commissioner on two days in October and November of 1946. The deputy police commissioner determined that the complaints were substantiated and revoked defendant's permit. The letter so advising defendant read in part as follows: "The complaints, in my opinion, have been fully substantiated. My determination in the matter is that you have, contrary to the provisions of law under which the permit was issued, ridiculed and denounced religion, and I am, therefore, in the exercise of discretion, as provided by law, revoking your permit effective forthwith." Defendant applied for another permit the next year, 1947, and again in 1948. Each time he received a notice that his application had been "Disapproved".

On September 11, 1948, commencing about 9:00 P. M., defendant conducted a religious meeting at Columbus Circle, between 58th and 59th Streets, in New York City. He was standing on a box or platform addressing a group of approximately twenty people. According to the testimony of the arresting officer and two members of the street audience, a major portion of defendant's address was devoted to attacks upon the Roman Catholic Church, and upon the Jewish people and Jewish faith. As to the Roman Catholic Church, for instance, he said that it made merchandise out of souls; that it is a religion of the devil. As to the Jewish people and their faith, he said "All the garbage that didn't believe in Christ should have been burnt in the incinerators.

It's a shame they all weren't." Before he ascended the platform, another speaker, apparently arranged for by defendant, had been speaking about the Jewish people and when some in the audience objected, the defendant spoke of the latter as "Christ-killers." Defendant did not deny the attacks but sought to justify them. There is no evidence of any disorder or breach of the peace in connection with this particular meeting, but defendant testified, generally, that while he had "no trouble at all" at his meetings when a police officer was present, he did have trouble in the absence of an officer. About 10:45 P. M., after he had been conducting the meeting for nearly two hours, a police officer approached defendant and asked him for his permit [fol. 63-11] to conduct the meeting. Defendant, of course, did not have one and was served with a summons for violation of the Administrative Code.

At the close of the People's case in the Magistrate's Court, counsel for defendant moved to dismiss the complaint on the ground that the statute upon which it was based was unconstitutional on its face as an abridgement of the freedoms of religion and speech guaranteed by the Federal and State Constitutions. At the close of the case, defendant's counsel renewed the motion on the ground that the statute as applied was unconstitutional.

The First Amendment to the Constitution of the United States guarantees the rights of freedom of speech, press, religion and assembly against abridgement by congressional action. The due process clause of the Fourteenth Amendment protects those rights against invasion by State or municipal action. (*Lovell* v. *City of Griffin*, 303 U. S. 444, 450, and cases there cited.) Beyond that, however, our own State Constitution is explicit in assuring those rights within our borders. (N. Y. Const., art. I, §§ 3, 8, 9.) But freedom of speech, press, religion, and assembly, often denominated our "civil liberties", are not absolute rights to be indiscriminately exercised under all circumstances and under all conditions. Social welfare requires, in certain instances, reasonable regulation of such activities which, unrestrained, would produce calamitous or undesirable results—not only for the locality and public order but also, in the long run, for the individual involved.

Since our streets and public places are traditionally and sometimes the only available forum for the dissemination

and propagation of ideas, the widest possible latitude must be permitted thereon for free expression and communication, however unpopular or misguided such ideas may seem to be. Municipalities, however, have a deep and legitimate interest in the manner in which their streets and public places are used. Specifically, municipalities have the power and are charged with the duty of maintaining safety and order upon streets and in public places for the comfort and convenience of the community. It is a matter of common knowledge that "collecting and promoting" assemblages of persons by street speakers sometimes occasions altercations and breaches of the peace. Particularly may that be so when the assemblage on the street is for public worship or exhortation. Likewise, it is common knowledge that such assemblages may disrupt traffic, both pedestrian and vehicular, and destroy the primary purpose of the streets as a means of travel and transportation from place to place. These are evils with which the municipality must cope and which the courts, subject to the constitutional guarantees, must recognize. In dealing with the problem, all branches of government must try to accommodate fairly the twin goals of unlimited freedom of speech, religion and assembly for all and the vigilant protection of the comfort, safety and convenience of all. This problem was well analyzed by Chief Justice Hughes in *Cox* v. *New Hampshire* (312 U. S. 569, 574, quoted hereafter at pp. 288-289 of this opinion).

[fol. 63-12]

The statute before us is said to be unconstitutional on its face, i. e., that under no circumstances may it be constitutionally applied. That contention is predicated, however, upon certain assumptions as to the question before the court and as to the scope and operation of the statute, which in our view are incorrect. We must first construe and interpret a statute so that its exact meaning may be clear before an attempt is made to determine whether it is violative of the Constitution. In approaching that primary task, we must adopt the basic principle that, when possible, a statute will be construed and interpreted in such manner as to avoid not only a finding of unconstitutionality but also to avoid any serious doubt upon that score. The cogent reason behind that principle is that legislative bodies, no less than the courts, are presumed to be imbued with respect for our constitutional provisions and to be unwilling to destroy a

right guaranteed by the Constitution. (*People* v. *Barber*, 289 N. Y. 378, 385.) Thus, if there be any possibility that an enactment may be read in such manner as to avoid objections as to its constitutionality, that construction is to be preferred.

Since defendant is concededly within the group of persons specified in the second sentence of subdivision a, and has not been convicted of ridiculing or denouncing any form of religious belief, service or reverence, the sole issue before us, in considering whether the statute is void on its [fol. 63-13] face, is whether that portion, applicable to a person so situated as the defendant, can be constitutionally applied under any circumstances. (*Marbury* v. *Madison*, 1 Cranch [U. S.] 137; *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 568 *et seq.*, and cases there cited; *Headley* v. *City of Rochester*, 272 N. Y. 197, 204; *O'Kane* v. *State of New York*, 283 N. Y. 439, 449.) In deciding that issue we must read the requirements of the statute in the light of administrative procedures set up by the police department to implement it. Thus, we find, it provided that certain persons, of whom defendant is one, may obtain permits from the police commissioner to conduct religious services in any public place or places specified in the permit. The police commissioner obviously sought to lighten the burden of continuous daily or weekly applications for such permits by adopting regulations authorizing the issuance of a blanket permit, effective for the applicant for a year, and requiring the permittee merely to notify the local precinct commander of the time and place of any street meeting he or she might intend to hold. In ultimate effect, the commissioner issues a permit permanently to those persons specified in subdivision a, merely requiring a new application each year as a current administrative measure, thus assuring for himself an up-to-date list of living, practicing individuals who intend to conduct religious services on the public streets. The regulations further provide that said precinct commander "will approve" the location provided it does not interfere with traffic or other local conditions.

Reading the statute and the administrative machinery together, and mindful of the constitutional prohibition against antecedent censorship, we read it to provide that the police commissioner is under a duty to issue the permit as a

matter of course upon application by a person eligible therefor. This construction of the statute is warranted by its terms and obviates constitutional objections.

There is no doubt that the statute was enacted with a two-fold purpose. One objective was to lessen the possibility of disorder or breaches of the peace reasonably to be foreseen as a result of unregulated collection of assemblages in the streets for the espousal of, or attacks upon, religion in general or some particular practice or form of religious [fol. 63-14] belief. The second aim was to insure to the general public, without undue interruption or impairment, the normal use of the streets as a means of travel and transportation.

The first objective is sufficiently satisfied by the permit requirement itself, for, once put on notice that such a meeting will be held, the police may take such precautions as appear necessary. We see no warrant in the statute for the exercise of discretion by the police commissioner as to whether or not a particular applicant for a permit is likely to discuss matters which would have a tendency to provoke dispute and disorder. The statute does not give the commissioner any such express power and, since such discretion would confer upon him a power of antecedent administrative censorship, we certainly should not read it into the statute by construction. To allow the commissioner to refuse a permit whenever, in his discretion, he thought that the applicant might by his utterances provoke disorder or a breach of the peace would undoubtedly be extremely effective in preventing such occurrences, but by the same token such a discretion would make the commissioner a censor over what might and what might not be discussed on the streets of the city. That the socially desirable end of prevention of disorder may not thus be attained by infringement upon the freedom of speech and assemblage is firmly established. (See *Hague* v. *C. I. O.*, 307 U. S. 496, 514-517; *Terminiello* v. *Chicago*, 337 U. S. 1.) Of course, this does not mean that a street speaker may, with impunity, provoke or incite a riot or breach of the peace. Such conduct is properly declared unlawful by our Penal Law (see, e. g., art. 70, "Disorderly Conduct", and art. 188, "Riots and Unlawful Assemblies") and may be punished by appropriate action. The constitutional guarantee requires only that a municipality may not adopt unconstitutional means, i. e., censorship or previous restraint to prevent disorder.

Moreover, in view of the existing permit procedure, the second evident purpose of the ordinance is satisfied by the requirement that a holder of a permit notify the precinct commander of the time and location of any meeting he or she intends to conduct. The commissioner does not purport to make any determination as to the public convenience of the time and place of the proposed meeting *in advance* of [fol. 63-15] the issuance of the permit. That determination is made only *after* the permit is granted. Accordingly, the proper construction of the second sentence of subdivision a, and we so read it, is that the commissioner must issue a permit as a matter of course upon application therefor by an eligible person. At that point the commissioner's power is merely ministerial and not discretionary.

Thus viewed, the permit procedure set up in compliance with the ordinance grants no right of censorship or previous restraint to the commissioner and does not unconstitutionally infringe upon the freedoms of speech, religion and assembly. The permit procedure is substantially identical with that authorized by the park department regulation we unanimously sustained in *People* v. *Nahman* (298 N. Y. 95) and *People* v. *Hass* (299 N. Y. 190) and the language there used is by analogy appropriate here, substituting the words "public streets" for "public parks". In the *Nahman* case (*supra*) we said (pp. 102-103): "The regulation, we repeat, confers no power to suppress the publication of facts or opinions. On the contrary, as we have tried to demonstrate, it is in essence a nondiscriminatory provision which has for its sole objective the safety, comfort and convenience of the people of the city in their appropriate uses of its public parks. To our minds, the regulation—so read—is a reasonable measure of local control which affects civil liberties only in an allowable minor degree."

The *Nahman* and *Hass* cases (*supra*) it should be noted, do not proceed upon the broad theory that the State, or a municipality thereof, has plenary power over the use of its streets and public places and may limit or prohibit, in whole or in part, their use for speeches or meetings. Indeed, those decisions strongly indicate the contrary and, to that extent, would seem to qualify our previous decision in *People* v. *Smith* (263 N. Y. 255). In the *Smith* case (*supra*) we said in part (p. 257): "The legislative power might forbid public meetings and speaking in the streets entirely. It may limit the use of the streets to certain purposes." Such a

theory had been previously expressed by such eminent authorities as Justice Holmes in *Commonwealth* v. *Davis* (162 Mass. 510) and Justice White, on the affirmance by the [fol. 63-16] Supreme Court, *sub nomine Davis* v. *Massachusetts* (167 U. S. 43, 48). The "plenary power" theory, however, has been specifically repudiated by the Supreme Court in subsequent cases (see *Hague* v. *C. I. O.*, *supra*, at p. 515; *Jamison* v. *Texas*, 318 U. S. 413, 417; *De Jonge* v. *Oregon*, 299 U. S. 353, 364) and by the Massachusetts court itself (*Commonwealth* v. *Gilfedder*, 321 Mass. 335, 340). Thus, in the *Hague* case (*supra*) Justice Roberts stated (p. 515): " * * * Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. * * *." By refusing to place our decisions in the *Nahman* and *Hass* cases (*supra*), upon any such broad ground, we have recognized this development.

The permit procedure which implements the second sentence of subdivision a of the ordinance also satisfies the standards of permissible State police power approved by the Supreme Court of the United States. That court has not categorically condemned legislation which requires a permit as a condition to the use of the streets or public places for purposes of discussion, assembly or expression. The court has been careful to acknowledge the direct and legitimate interest of States and municipalities in the preservation of the safety, order and peace of the community. In a series of cases, the Supreme Court has struck down legislation which absolutely prohibits or levies a tax upon persons desiring the use of the streets for the expression or communication of ideas through the medium of handbills or pamphlets or for canvassing. (See *Schneider* v. *State*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413; *supra*; *Murdock* v. *Pennsylvania*, 319 U. S. 105; cf. *Lovell* v. *City of Griffin*, 303 U. S. 444, *supra*.) The court has also declared unconstitutional ordinances which require permits, the issuance of which is left to the undefined and uncontrolled discretion of a local official, for such activities on the public streets as solicitation for religious causes (*Cantwell* v. *Connecticut*, [fol. 63-17] 310 U. S. 296), distribution of religious publica-

tions (*Largent* v. *Texas*, 318 U. S. 418; cf. *Lovell* v. *City of Griffin*, *supra*) or operation of a sound truck. (*Saia* v. *New York*, 334 U. S. 558; but cf. *Kovacs* v. *Cooper*, 336 U. S. 77.) The court has invalidated an ordinance which required a permit for public assembly on public streets and places, although the ordinance specifically provided that "said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage." (*Hague* v. *C. I. O.*, 307 U. S. 496, *supra*.) The court there noted that "uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." (P. 516.) The vice of the ordinance in the *Hague* case was explained by Chief Justice Hughes in *Cox* v. *New Hampshire*, (312 U. S. 569, 577, *supra*): "* * * it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent 'riots, disturbances or disorderly assemblage.'"

Clearly, none of those situations is presented by the permit procedure here involved in view of our construction of the commissioner's power over issuances of the permits. As we have already indicated, the permit procedure vests no uncontrolled discretion in the commissioner. Instead, he must issue the annual permit as a matter of course upon application therefor by an eligible person. Subsequently, it is true, the precinct commander must determine whether the proposed time and place of the meeting will interfere with traffic or other local conditions. While this power of the precinct commander enables him to exercise a certain restraint upon freedom of speech, the restraint is so small as compared with the obvious social utility and necessity of regulation that it does not violate the constitution. It "is a reasonable measure of local control which affects civil liberties only in an allowable minor degree." (*People* v. *Nahman*, 298 N. Y. 95, 103, *supra*.) The existence of and the reason for that State power to impose slight limitations upon civil liberties in such situations was well stated by Chief Justice Hughes in the *Cox* case (*supra*). There, the [fol. 63-18] Supreme Court upheld a conviction based upon an ordinance prohibiting an unlicensed parade or procession upon any public street or way. He said in part (p. 574): "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public

order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection.' One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.'' Finally, it is important to note that the present Supreme Court in October of this year refused to review our decision in *People* v. *Hass* (*supra*), on the ground that it did not present a Federal question, and thus that a permit requirement is not, in and of itself, an unconstitutional procedure.

Nor does the fact that the permit procedure is limited to the collection of assemblages by speakers on topics pertaining to religion and does not apply to topics unrelated to religion render it invalid. The local legislative body, in its wisdom, may determine that street meetings for discussions [fol. 63-19] of matters of religion are fraught with such potentialities of disorder and violence that some regulation is imperative in the interest of public tranquility. (For instance, here the defendant quite frankly stated that he had no trouble during his discussions if there were an officer beside him, but that he customarily did when an officer was not present.) Such determination results in a classification founded upon reason, and, as such, is not

invalid. This point was squarely decided by us in *People* v. *Smith* (263 N. Y. 255, *supra*), where we said, per Pound, Ch. J. (p. 257): "* * * The passion, rancor and malice sometimes aroused by sectarian religious controversies and attacks on religion seem to justify especial supervision over those who would conduct such meetings on the public streets. That the ordinance does not cover all street meetings is no objection to a reasonable classification. Practical exigencies and common experience may permit the recognition of degrees of harm and the limitation of regulation to classes where the need is deemed to be clearest." Defendant's appeal to the Supreme Court in that case was dismissed for want of a substantial Federal question (292 U. S. 606 [1933]), the three cases cited by that court indicating that the reasonableness of the classification was deemed the question sought to be reviewed. Thus, on the point of whether the municipality may constitutionally regulate religious street meetings and not others, the *Smith* case (*supra*) is controlling.

While the relevant portions of the statute and the implementing administrative procedure are not in violation of the Constitution, we think it clear that the application of the permit procedure to this defendant constituted a violation of his right of freedom of speech and assembly. As previously stated, a permit, effective for a year, had been duly issued to defendant in 1946. In the fall of that year, however, the permit was revoked by the police commissioner, in his discretion, on the ground that defendant had ridiculed and denounced religion. Applications by defendant for a permit in 1947 and 1948 were disapproved. Manifestly, the reason for such disapproval was the commissioner's determination that defendant, if permitted to speak, would again ridicule and denounce religion. [fol. 63-20] This conduct on the part of the commissioner was not justified in law and amounted to administrative censorship. It was a previous restraint upon defendant's right to speak. Unlike the application of the permit procedure we approved in the *Kuhman* and *Hass* cases (*supra*), the commissioner here utilized the permit procedure to prevent the publication of facts or opinions whatever one may think of them. No such authority is granted to him by the statute itself and, as stated above, it cannot be constitutionally read into it by construction. Assuming

that the prohibition against ridiculing or denouncing religion is constitutional, the sole means of enforcement is through a criminal action charging its violation or in a proper case charging disorderly conduct under section 722 of the Penal Law; section 1458 of the New York City Consolidation Act (L. 1882, ch. 410); *People* v. *Galpern*, (259 N. Y. 279, 282), and *People* v. *Hipple*, (263 N. Y. 242). (See, also, New York City Charter, § 435.) It cannot be enforced by a trial of the alleged offender before an administrative officer, nor can an administrative finding of guilt thereof be made the basis for a refusal to grant a permit.

Police protection may well be necessary to secure for this defendant his constitutional right to speak freely as an ordained Baptist clergyman. The Constitution does not discriminate between those whose ideas are popular and those whose views arouse hatred and animosity—guaranteeing the right of freedom of speech to the former and withholding it from the latter. This defendant has the right to express himself concerning religious beliefs, no matter how misguided and unpopular they may be and if his exercise of that right arouses passion in the community and requires the attendance of police officers, that is a small cost which must be paid by us for our continued freedom. We may expect from his past actions that the defendant will in the future go beyond the mere expression of ideas, and so speak as to incite disturbances and breaches of the peace. When and if he does, he may be punished therefor in an appropriate criminal action but justifiable expectations do not authorize the commissioner to refuse to permit the defendant to speak about religion in the future on the streets of the city of New York.

[fol. 63–21] Since the permit requirement in the second sentence of subdivision a of section 435-7.0 of the Administrative Code was thus unconstitutionally applied to the defendant, his conviction, based upon his failure to possess a permit which he has demonstrated is impossible of procurement, cannot stand. It is not an answer to say that defendant, after exhausting his administrative remedies, should then have retained counsel to institute an expensive and lengthy article 78 proceeding, in order to enjoy his elementary constitutional rights.

The order of the Appellate Part of the Court of Special Sessions should be reversed and the complaint dismissed.

DISSENTING OPINION

BROMLEY, J. (dissenting):

By its terms Section 435-7.0 of the Administrative Code of New York City prohibits the public discussion of religious topics in "any street" of that city by anyone who is not, at least, a member of "any church or incorporated missionary society", or an "authorized representative of a duly incorporated organization devoted to the advancement of the principles of atheism or agnosticism". One who is a member of a group permitted to discuss religion may do so "in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner." The statute also makes it unlawful for any person "to ridicule or denounce any form of religious belief" in a street or public place.

As construed by the police commissioner the statute gives him discretion to deny a permit to one whose past conduct has indicated that, if permitted to speak, he will ridicule and denounce religion, or a particular faith, so as to provoke disorder. Appellant Kunz received a permit to speak during the year 1946. The police commissioner has exercised his discretion to revoke that permit, and to deny Kunz annual permits for 1947 and 1948. The revocation, and presumably the denials, rested upon an administrative finding that Kunz had "ridiculed and denounced religion" upon several occasions in 1946. Kunz has been convicted for conducting a religious meeting without a permit on September 11, 1948, at Columbus Circle in New York City.

Unless the prohibition against ridicule and denunciation of religion shall be read as indicating a criterion to be em- [fol. 63–22] ployed by the police commissioner in determining whether to grant or withhold a permit, the statute provides no limit to his discretion. The law has been so construed by that officer, and his construction accords with the fair import of its terms. It is here immaterial that the police commissioner has followed a practice of granting automatically a permit to any of the persons described in the statute on first application therefor. Moreover, it should be noted that the police commissioner apparently is to determine whether or not an applicant for a permit falls within one of those groups whose speech is tolerated.

Numerous decisions of the Supreme Court of the United States, since this ordinance was sustained by us in 1934 (*People* v. *Smith*, 263 N. Y. 255), indicate clearly that the requirement of a permit for the exercise of the rights of speech, assembly or religion in public places is invalid under the Fourteenth Amendment if the licensing official is afforded discretion to grant or withhold a permit upon criteria so broad as these (*Saia* v. *New York*, 334 U. S. 558; *Largent* v. *Texas*, 318 U. S. 418; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496). In each case wherein such statutes have been sustained it was plain that the permit requirement served only two legitimate ends—to permit determination of the appropriate place and time for a proposed assembly with respect to the convenience of others, and to afford notice to the authorities of an assembly which might provoke disorder—without regard to the content of proposed speech (*Cox* v. *New Hampshire*, 312 U. S. 569; *People* v. *Hass*, 299 N. Y. 190; *People* v. *Nahman*, 298 N. Y. 95). Although a State may venture beyond those purposes in a legitimate effort to avert serious threat of disorder by a statute "narrowly drawn to prevent the supposed evil" (*Cantwell* v. *Connecticut*, *supra*, at p. 307), no such attempt is apparent in this law.

We are asked to construe the ordinance as precisely analogous to the provisions considered in *People* v. *Nahman* and *People* v. *Hass* (*supra*). The courts have been "inclined to adopt that reasonable interpretation of a statute which removes it farthest from possible constitutional infirmity" [fol. 63-23] (*Kovacs* v. *Cooper*, 336 U. S. 77, 85). However, a limitation inheres in that doctrine; strained and unnatural interpretation should not be employed to preserve a law so vulnerable as section 435-7.0 (see *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 519-521).

If the vice of this law were not apparent in its terms, the impact of its administration upon Kunz should demonstrate beyond cavil that he has suffered an invalid and absolute previous restraint upon his right to discuss religion in public. His case affords a striking parallel to *Near* v. *Minnesota* (283 U. S. 697). There the future publication of a newspaper had been enjoined upon the ground that it had offended in the past through publishing "malicious, scandalous and defamatory articles" (p. 703). The evil of the

injunction inhered in the censorship it established, for Near could have resumed publication under threat of a contempt penalty for matter found invidious by the court. The absolute and previous restraint upon the speech of Kunz surely can stand upon no stronger ground than the decree condemned in *Near* v. *Minnesota* (*supra*).

Section 435-7.0 of the Administrative Code of New York City should be held invalid upon its face under the Fourteenth Amendment to the United States Constitution and under those provisions of the New York Constitution which guarantee freedom of speech and religion (art. I, §§ 3, 8). The judgment should be reversed and the complaint dismissed.

Loughran, Ch. J., Lewis and Dye, JJ., concur with Desmond, J.; Conway, J., dissents in opinion; Bromley, J., dissents in separate opinion in which Fuld, J., concurs.

Judgment affirmed.

[fol. 64] In Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of December in the year of our Lord one thousand, nine hundred and forty-nine, before the Judges of said Court.

Witness, the Hon. John T. Loughran, Chief Judge, Presiding.

John Ludden, Clerk.

Remittitur—December 29, 1949

[fol. 65] The People &c., Respondent,

against

Carl Jacob Kunz, Appellant

Be it remembered, That on the 21st day of May, in the year of our Lord one thousand nine hundred and forty-nine, Carl Jacob Kunz, the appellant in this cause, came here unto the Court of Appeals, by Mercedes Hoffman, his at-

torney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Court of Special Sessions of the City of New York. And the People, &c., the respondent in said cause, afterwards appeared in said Court of Appeals by John P. McGrath, attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Osmond K. Fraenkel, of counsel for the appellant, and by Mr. Joseph J. Lucchi, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed.

[fol. 66] And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Special Sessions of the City of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, December 29, 1949:

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal)

[fol. 67] IN SUPREME COURT OF THE UNITED STATES

CARL JACOB KUNZ, Appellant

against

THE PEOPLE OF THE STATE OF NEW YORK, Appellee

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Hon. Robert H. Jackson, Associate Justice of the United States Supreme Court:

Appellant, Carl Jacob Kunz, feeling aggrieved by the judgment of the Court of Appeals of the State of New York rendered December 29, 1949, affirming his conviction by a New York City Magistrate for violating Section 435-7.0 of the Administrative Code of the City of New York, for the reasons set forth in his Assignment of Errors included herein pursuant to Rule 36, Paragraph 1, of the Rules of the Supreme Court of United States, hereby respectfully prays that an appeal be allowed from the judgment of the Court of Appeals to the Supreme Court of the United States pursuant to the provisions of Section 1257 of Title 28 of the United States Code.

Pursuant to Rule 12 of the Rules of the United States Supreme Court, appellant presents with this petition a separate typewritten statement particularly disclosing the basis upon which he claims that the Supreme Court of [fol. 68] the United States has jurisdiction to review the judgment in question.

On March 15, 1950 a petition for the allowance of this appeal, substantially identical with the within petition, was presented to Hon. John T. Loughran, Chief Judge of the Court of Appeals of the State of New York, and denied by him.

STATEMENT

This case is one in which is drawn into question the validity of Section 435-7.0 of the Administrative Code of the City of New York on the ground that on its face and as construed by the Court of Appeals of New York said section is repugnant to the Fourteenth Amendment to the Constitution of the United States, the decision of said

Court being in favor of the validity of such section as so construed.

Therefore, in accordance with Rule 36, Paragraph 1 of the Rules of the Supreme Court of the United States and Section 1257 of Title 28 of the United States Code, appellant respectfully shows that the case is one in which a review may be had in the Supreme Court on appeal as a matter of right, and accordingly prays that such appeal be allowed and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

ASSIGNMENT OF ERRORS

Appellant in the above case, together with the foregoing petition for allowance of appeal to the Supreme Court of [fol. 69] the United States files herewith the following assignment of errors which he alleges were committed by the Court of Appeals of New York in its judgment affirming his conviction by a Magistrate of the City of New York:

1. The Court of Appeals erred in holding that Section 435-7.0 of the Administrative Code of the City of New York is constitutional and valid on its face, and in refusing to hold that it abridges freedom of religion and freedom of speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. The Court of Appeals erred in holding that Section 435-7.0 of the Administrative Code of the City of New York is constitutional as applied to this appellant, and in refusing to hold that as applied it abridges his freedom of religion and freedom of speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals erred in affirming the judgment of conviction of appellant by a Magistrate of the City of New York pursuant to which appellant paid a fine, which affirmance was based on its construction of said section of the Administrative Code.

Wherefore appellant prays that the judgment of the Court of Appeals of December 29, 1949, affirming the judgment of the City Magistrate of October 14, 1948 convicting

appellant of violation of said section of the Administrative Code be reversed.

Dated: March 16th, 1950.

Respectfully submitted, Osmond K. Fraenkel, Attorney for Appellant.

[fol. 70] In Supreme Court of the United States

Carl Jacob Kunz, Appellant

against

The People of the State of New York, Appellee

Order Allowing Appeal

It appearing to this Court that Carl Jacob Kunz has filed his petition for appeal to this Court and has filed therewith his assignment of errors, and also his statement as to the jurisdiction of this Court as required by Rule 12 thereof, disclosing that this Court has jurisdiction upon appeal to review the judgment of the Court of Appeals of the State of New York affirming his conviction by a Magistrate of the City of New York, rendered herein on December 29, 1949; it is

Ordered that the appeal prayed for be and the same hereby is allowed and granted to the Supreme Court of the United States from the judgment of the Court of Appeals of the State of New York, affirming appellant's conviction by a Magistrate of the City of New York, rendered on December 29, 1949, and that said appellant give a bond with good and sufficient security in the sum of $100 that he, as appellant, shall prosecute his appeal to effect and also pay damages and costs if he fails to make his appeal good.

Dated: March 21, 1950.

Robert H. Jackson, Associate Justice of the United States Supreme Court.

[fols. 71-72-116] Citation in usual form omitted in printing.

[fols. 117-119] Bond on appeal for $100.00 approved March 29, 1950, omitted in printing.

[fol. 120] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Court of Special Sessions of the City of New York:

Please take notice that appellant hereby designates the following portions of the record herein to be incorporated in the transcript to be sent to the United States Supreme Court:

1. The case on appeal on file to the Court of Appeals of the State of New York, containing all the proceedings previously had herein.

2. Remittitur of the Court of Appeals of the State of New York.

3. The opinions of the Court of Appeals of the State of New York.

4. Petition to the Hon. Robert H. Jackson, Associate Justice of the United States Supreme Court, for the allowance of an appeal to said Court.

5. Jurisdictional statement accompanying said petition.

6. Order of Hon. Robert H. Jackson allowing said appeal.

7. Citation issued by Hon. Robert H. Jackson.

Dated: March 24, 1950.

Yours, etc., Osmond K. Fraenkel, Attorney for Appellant, Office & P. O. Address 120 Broadway, New York 5, N. Y.

[fols. 121-122] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 123] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed May 25, 1950

Please take notice that appellant hereby designates all of the record as necessary for the consideration of the following points on which he intends to rely:

(1) Section 435-7.0 of the Administrative Code of the City of New York violates the due process clause of the Fourteenth Amendment on its face because

a. It contains inherent powers of censorship;

b. It fails to prescribe proper standards for the exercise of official discretion;

c. It contains broad and vague prohibitions upon the content of a speaker's remarks;

d. It requires previous registration as a condition to exercising the right to make a public speech.

(2) Section 435-7.0 of the Administrative Code of the City of New York violates the due process clause of the Fourteenth Amendment as applied to appellant because he was denied the right to make future speeches solely because of the content of speeches made by him in the past.

Dated: May 19, 1950.

Osmond K. Fraenkel, Attorney for Appellant, 120 Broadway, New York 5, N. Y.

[fols. 124-126] To: John P. McGrath, Esq., Corporation Counsel of the City of New York, Municipal Building, New York 7, N. Y. Frank S. Hogan, Esq., District Attorney of the County of New York, 155 Leonard Street, New York 13, N. Y.

[fol. 127] [File endorsement omitted]

[fol. 128] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 15, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsed on Cover:] Enter Osmond K. Fraenkel. File No. 54,517, New York, Court of Appeals, Term No. 768. Carl Jacob Kunz, Appellant, vs. The People of the State of New York. Filed April 21, 1950. Term No. 768 O.T. 1949.